15-334

1881

TRAN.

SUPREME COURT OF THE UNITED STATES.

No. 225.

EMILY SULLIVAN ET AL., PLAINTIFFS IN ERROR,

vs.

H. BURNETT ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED AUGUST 9, 1879.

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INDEX.

	Original.	Print.
Writ of error	A	1
Return to	B	1
Citation	C	1
Petition	1	2
Summons	3	3
Return	4	4
Order for alias writ	4	4
Summons	4	4
Return	5	4
Answer	6	5
Stipulation of facts	7	6
Submission	9	7
Special finding	9	7
Judgment	10	8
Special finding, &c., set aside	10	8
Resubmission	10	8
Special finding	10	8
Judgment	11	8
Bill of exceptions allowed	12	9
Bill of exceptions	12	9
Motion for new trial	17	12
Bond	19	14
Clerk's certificate	20	14

A THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, at the September term, 1878, thereof, between Emily Sullivan et al., plaintiffs, and H. Burnett et al., defendants, a manifest error hath happened to the great damage of the said plaintiffs, as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this second day of December, in the year of our Lord one thousand eight hundred and seventy-eight.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri,
By T. L. CRAWFORD,
Deputy.

Allowed by—

SAMUEL TREAT, *Judge.*

B *Return to writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court at office in the city of St. Louis this 11th day of December, A. D. 1878.

[SEAL.] M. M. PRICE,
Clerk of said Court,
By T. L. CRAWFORD, *D. C.*

(Indorsed:) No. 1170. United States circuit court, eastern district of Missouri, vs. . Writ of error. To the court of the of Missouri. Returned and filed day of , 187 . , clerk.

C The United States of America to H. Burnett, William H. Burnett, and the German Savings Institution, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C.,

on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein Emily Sullivan and others are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this second day of December, in the year of our Lord one thousand eight hundred and seventy-eight.

SAMUEL TREAT,
Judge United States Circuit Court, Eastern District of Missouri.

Due service of above citation is hereby acknowledged.
FINKELNBURG & RASSIEUR,
Att'ys for Def'ts.

(Indorsed:) 1170. United States circuit court, eastern district of Missouri. Emily Sullivan et al. vs. N. K. Fairbank et al. Citation. Filed , 187 . , clerk.

1 THE UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States in and for said district.

Be it remembered that heretofore, to wit, on the 7th day of February, 1878, there was filed in the office of the clerk of said court a certain petition, which is in the words and figures following, to wit:

Petition.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States for the eastern district of Missouri, to the March term, A. D. 1878.

EMILY SULLIVAN, JEREMIAH SULLIVAN, GEORGE Frederick Mowlds, and Mary Mowlds, his wife, plaintiffs.
vs.
NATHANIEL K. FAIRBANK, WILLIAM H. BURNET, Joseph Sears, and H. Burnet, defendants.
} In ejectment.

Emily Sullivan, Jeremiah Sullivan, George Frederick Mowlds, and Mary Mowlds, his wife, the plaintiffs, who are aliens and subjects of Victoria, Queen of the United Kingdom of Great Britain and Ireland, by John Boyle, their attorney, complain of Nathaniel K. Fairbank, William H. Burnet, Joseph Sears, and H. Burnet, the defendants, all of whom are citizens of the State of Missouri, residing in said eastern district thereof, and allege that the said George Frederick Mowlds and Mary Mowlds are husband and wife; that on the sixteenth day of May, A. D. 1870, the plaintiffs were lawfully entitled to the possession of the following described premises, situated in the city of St. Louis, in said eastern district of said State of Missouri, namely: A lot of ground in city block, numbered thirty-five, of said city, beginning at a
2 point in the northern line of Elm street, where the same is inter-

sected by a line drawn through the middle of a twenty-foot alley, as now laid out, running north and south through said block; thence running eastwardly from the middle of said alley along the northern line of Elm street seventy-six feet and four inches, more or less, as the same may measure, to the western line of a lot sold by John Mullanphy, in his lifetime, to Louis Menard; thence northwardly with said western line of lot of said Louis Menard one hundred and twenty-eight feet, more or less, to the lot formerly belonging to Margaretta Blondeau; thence westwardly seventy-six feet and four inches, more or less, as the same on measurement may hold out, to the middle of said alley running through said block from north to south; thence southwardly along the middle of said alley one hundred and twenty-eight feet, more or less, to the point of beginning on Elm street, now bounded on the north by lot of Augustus Miller, on the west by the western half of said alley, on the south by Elm street, and on the east by lots of Herman Haeussler, Green Erskine, and James Givens, being the same property conveyed to James Lyons and Edward Sullivan by Emanuel De Hodiament by deed dated January fifth, A. D. 1857, recorded in book 183, page 357, of the recorder's office of said city of St. Louis, reference being here made to said deed for a full description of said property. And being so entitled to the possession thereof, the defendants afterwards, to wit, on the seventeenth day of May, A. D. 1870, unlawfully entered into said premises, and now unlawfully withhold from the plaintiffs the possession thereof to the damage of plaintiffs in the sum of ten thousand dollars.

And plaintiffs state that the monthly value of said premises was and is two hundred dollars.

Wherefore plaintiffs pray judgment for the possession of said
3 premises, with damages to the amount of ten thousand dollars for the unlawfully withholding the same from the plaintiffs—for two hundred dollars a month, the monthly value thereof, from the rendition of judgment until possession of said premises is delivered to the plaintiffs, for their costs, and all other proper relief, &c.

JOHN BOYLE,
Att'y for Plaintiff.

Summons.

And thereupon a summons was issued, which, with the return of service thereon, is in words and figures as follows:

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

In the circuit court of the United States in and for said district.

The President of the United States of America to the marshal of the United States in and for said district, greeting:

You are hereby commanded to summon Nathaniel K. Fairbank, William H. Burnet, and Joseph Sears, citizens of the State of Missouri, that they be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of March next, then and there to answer the complaint of Emily Sullivan, Jeremiah Sullivan, George Frederick Mowlds, and Mary Mowlds, his wife, who are aliens and subjects of Victoria, Queen of the United Kingdom of Great

Britain & Ireland, as set forth in the petition filed in said court on the seventh day of February, A. D. eighteen hundred and seventy-eight. Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 9th day of February, A. D. eighteen hundred and seventy eight. Issued at office in city of
4 St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] M. M. PRICE, *Clerk*.
By T. L. CRAWFORD, *Deputy*.

Return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

I return this writ unexecuted, as the within named Nathaniel K. Fairbank, William H. Burnet, and Joseph Sears could not be found in said district. This 11th day of March, 1878.

H. W. LEFFINGWELL,
United States Marshal, Eastern District of Missouri.
By CHAS. H. LEFFINGWELL, *Deputy*.

And afterwards, at the March term, 1878, of said court, and on the 4th day of April, 1878, the following proceedings were had in said cause, to wit:

Order for writ &c.

EMILY SULLIVAN ET AL., PLAINTIFFS,
vs.
NATHANIEL K. FAIRBANK, DEFENDANTS.

Now come the plaintiffs by their attorneys, and, by leave of court, make H. Burnet a party defendant herein; whereupon it is ordered that a summons issue against said Burnet.

And the said writ so issued is in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set.

In the circuit court of the United States in and for said district.

The President of the United States of America to the marshal of the United States in and for said district, greeting:

You are hereby commanded again to summon Nathaniel K. Fairbank, William H. Burnett, Joseph Sears, and H. Burnet, citi-
5 zens of the State of Missouri, that they be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of September next, then and there to answer the complaint of Emily Sullivan, Jeremiah Sullivan, George Frederick Mowlds, and Mary Mowlds, his wife, aliens, and subjects of Victoria Queen of the

United Kingdom of Great Britain and Ireland, as set forth in the petition filed in said court, on the seventh day of February, A. D. eighteen hundred and seventy-eight. Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 5th day of April, A. D. eighteen hundred and seventy-eight. Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy*.

Return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set.

I have executed this writ by delivering a copy thereof, together with a copy of the petition thereto attached, to the within named William H. Burnett, at St. Louis, in said district, this 6th day of April, 1878.

H. W. LEFFINGWELL,
United States Marshal, Eastern District of Missouri.
By JAMES B. GEGGIE, *Deputy*.

And afterward, at said March term of said court, the following proceedings were had in said cause, on the 18th day of May, 1878, to wit:

6 EMILY SULLIVAN ET AL., PLAINTIFFS,
vs.
N. K. FAIRBANK ET AL., DEFENDANTS.

Now come H. Burnet, and the German Savings Institution by Messrs. Finkelnburg & Ralsieur their attorneys, and by leave of court enter their appearance, and ask to be made parties defendant herein, which is allowed; whereupon the parties herein by their attorneys file a stipulation agreeing that the depositions to be taken in the case of Sullivan et al. vs. Daeumer may be read in this case subject to objection for incompetency and irrelevancy.

And afterwards, on the 21st day of September, 1878, the following answer was filed in said case, to-wit:

Answer.

In the circuit court of the United States for the eastern district of Missouri, September term, A. D. 1878.

UNITED STATES OF AMERICA,
East. Dist. Mo., ss.:

EMILY SULLIVAN ET AL., PLAINTIFFS,
vs.
NATH'L K. FAIRBANK, H. BURNET, THE GERMAN SAVINGS INSTITUTION ET AL., DEFENDANTS.

Now come H. Burnett, Wm. H. Burnett, and the German Savings Institution, parties defendant in the above-entitled cause, and for answer

Britain & Ireland, as set forth in the petition filed in said court on the seventh day of February, A. D. eighteen hundred and seventy-eight. Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 9th day of February, A. D. eighteen hundred and seventy eight. Issued at office in city of
4 St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] M. M. PRICE, *Clerk*,
By T. L. CRAWFORD, *Deputy*.

Return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

I return this writ unexecuted, as the within named Nathaniel K. Fairbank, William H. Burnet, and Joseph Sears could not be found in said district. This 11th day of March, 1878.

H. W. LEFFINGWELL,
United States Marshal, Eastern District of Missouri.
By CHAS. H. LEFFINGWELL, *Deputy*.

And afterwards, at the March term, 1878, of said court, and on the 4th day of April, 1878, the following proceedings were had in said cause, to wit:

Order for writ &c.

EMILY SULLIVAN ET AL., PLAINTIFFS,
vs.
NATHANIEL K. FAIRBANK, DEFENDANTS.

Now come the plaintiffs by their attorneys, and, by leave of court, make H. Burnet a party defendant herein; whereupon it is ordered that a summons issue against said Burnet.

And the said writ so issued is in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set.

In the circuit court of the United States in and for said district.

The President of the United States of America to the marshal of the United States in and for said district, greeting:

You are hereby commanded again to summon Nathaniel K. Fairbank, William H. Burnett, Joseph Sears, and H. Burnet, citi-
5 zens of the State of Missouri, that they be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of September next, then and there to answer the complaint of Emily Sullivan, Jeremiah Sullivan, George Frederick Mowlds, and Mary Mowlds, his wife, aliens, and subjects of Victoria Queen of the

United Kingdom of Great Britain and Ireland, as set forth in the petition filed in said court, on the seventh day of February, A. D. eighteen hundred and seventy-eight. Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 5th day of April, A. D. eighteen hundred and seventy-eight. Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy*.

Return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set.

I have executed this writ by delivering a copy thereof, together with a copy of the petition thereto attached, to the within named William H. Burnett, at St. Louis, in said district, this 6th day of April, 1878.

H. W. LEFFINGWELL,
United States Marshal, Eastern District of Missouri.
By JAMES B. GEGGIE, *Deputy*.

And afterward, at said March term of said court, the following proceedings were had in said cause, on the 18th day of May, 1878, to wit:

6 EMILY SULLIVAN ET AL., PLAINTIFFS,
vs.
N. K. FAIRBANK ET AL., DEFENDANTS.

Now come H. Burnet, and the German Savings Institution by Messrs. Finkelnburg & Ralsieur their attorneys, and by leave of court enter their appearance, and ask to be made parties defendant herein, which is allowed; whereupon the parties herein by their attorneys file a stipulation agreeing that the depositions to be taken in the case of Sullivan et al. vs. Daeumer may be read in this case subject to objection for incompetency and irrelevancy.

And afterwards, on the 21st day of September, 1878, the following answer was filed in said case, to-wit:

Answer.

In the circuit court of the United States for the eastern district of Missouri, September term, A. D. 1878.

UNITED STATES OF AMERICA,
East. Dist. Mo., ss.:

EMILY SULLIVAN ET AL., PLAINTIFFS,
vs.
NATH'L K. FAIRBANK, H. BURNET, THE GERMAN SAVINGS INSTITUTION ET AL., DEFENDANTS.

Now come H. Burnett, Wm. H. Burnett, and the German Savings Institution, parties defendant in the above-entitled cause, and for answer

to plaintiffs' petition say, that they have not knowledge or information sufficient to form a belief as to whether said George Frederick Moulds and Mary Moulds are husband & wife.

Defendants deny that on the 16th day of May, 1870, or at any other time plaintiffs were entitled to the possession of the premises
7 described in the petition; and deny that defendants or either of them afterwards onthe 17th day of May, 1870, or at any time, unlawfully entered into said premises, or that they unlawfully withhold the possession of the said premises from plaintiffs, or that plaintiffs have been damaged in any sum by reason of any acts of defendants or either of them.

Defendants further deny that the monthly value of said premises is two hundred dollars. And having fully answered, defendants pray to be discharged with their costs.

FINKELNBURG & RASSIEUR.
Att'ys for Def'ts.

And afterwards, on the 18th day of September, 1878, there was filed in said case the following stipulation of facts.

Stipulation of facts.

In the United States circuit court for the eastern district of Missouri, September term, 1878.

EMILY SULLIVAN ET AL., PLAINTIFFS.
vs.
NATHANIEL K. FAIRBANK ET AL., DEFENDANTS.

In this cause defendants admit—

1st. That John Mullanphy's property was duly partitioned among his heirs, and that the commissioners in partition, by deed dated January 21st, 1843, duly conveyed the lot in controversy to his daughter Catherine Graham.

2d. That the estate left by James Lyons, at his decease, was finally settled December 20, 1861, by his executor, as appears of record in the probate court of the city of St. Louis, State of Missouri.

3d. That Edward Sullivan died intestate, a resident of said city,
8 and the administration on his estate was finally settled September 8, 1869, as appears of record in said probate court, and the production in court of any of the aforesaid records, or copies thereof, is hereby expressly waived.

4th. That Edward Sullivan took out naturalization papers during his lifetime, but whether he took out both first and second papers, is not known.

FINKELNBURG & RASSIEUR.
Att'ys for Def'ts.

And afterwards, at the said September term, 1878, of said court, the following proceedings were had on the 8th day of November, 1878, t wit:

EMILY SULLIVAN ET AL., PLAINTIFFS.
vs.
N. K. FAIRBANK ET AL., DEFENDANTS.

Now come the parties by their attorneys, the plaintiffs by John Boyle esquire, and the defendants by Messrs. Finkelnburg and Rassieur, and

file a stipulation as to collateral kindred of Edward Sullivan, deceased, in the United States; and this case being now regularly called for trial, by leave of court the plaintiffs dismiss their petition as to plaintiffs Mary Mowlds and George F. Mowlds; and thereupon the evidence herein is heard by the court without the intervention of a jury, but not being concluded at the hour of adjournment, it is ordered that further proceedings in this cause be continued until to-morrow morning.

And afterwards, at said September term, 1878, of said court, and on the 9th day of November, 1878, the following further proceedings were had in said cause, to wit:

9 *Submission.*

EMILY SULLIVAN ET AL., PLAINTIFFS,
vs.
NATHANIAL K. FAIRBANK, ET AL., DEFENDANTS.

Now come the parties by their attorneys, the plaintiffs by John Boyle, esquire, and the defendants by Messrs. Finkelnburg and Rassieur, and this case being now submitted to the court without the intervention of a jury, upon the pleadings, proofs and arguments of counsel, on consideration whereof, and being fully advised in the premises, the court now returns and orders to be entered of record the following special finding of facts, to wit:

Special finding.

The court finds that Edward Sullivan held and acquired the real estate in question, through conveyances from Valois who inhabited and possessed the same prior to December, 20, 1803, and that said Edward Sullivan, and those under whom he claimed, had continuous, open, notorious and adverse possession under said conveyances for more than thirty years.

The plaintiff Emily Sullivan was the sister of Edward Sullivan, and the other plaintiff, Jeremiah Sullivan, is the son of Edward Sullivan's brother, deceased.

It is admitted that plaintiffs are now and always have been non-resident aliens, and that no one of them had made a declaration of intention to become a citizen of the United States, therefore, under the laws of Missouri in force at the death of Edward Sullivan, in the year 1866, the plaintiffs were incapable of acquiring the real estate in dispute, especially as there were several aliens resident in the United States who had declared their intentions to become citizens of the United States, and also a resident alien in Missouri, to whom the real estate would descend subject to the limitations named in the Missouri
10 statutes. The value of the property sued for is over five thousand dollars.

It is therefore considered by the court that the plaintiffs take nothing by their writ herein, and that the defendants Nathaniel K. Fairbank, William H. Burnett, Joseph Sears, and H. Burnett go hence without day, and have and recover of said plaintiffs Emily Sullivan and Jeremiah Sullivan their costs herein expended, and that a fee bill or execution issue therefor.

And afterwards, on the 2d day of December, 1878, it being an ad-

journed day of the September term, 1878, of said court, the following further proceedings were had in said cause, to wit:

Special finding & judgm't set aside.

EMILY SULLIVAN ET AL., PLAINTIFFS,
vs.
N. K. FAIRBANK ET AL., DEFENDANTS.

Now come the parties by their attorneys, the plaintiffs by John Boyle, esq'r, and the defendants by G. A. Finkelnburg, esq'r, and on motion it is ordered that the judgment and special finding entered herein on November 9th, 1878, be, and the same is hereby, set aside, and thereupon said plaintiffs dismiss this cause as to defendants N. K. Fairbank and Joseph Sears.

Submission.

And this case coming on to be heard, the same is now submitted to the court without the intervention of a jury, upon the pleadings, proofs, and arguments of counsel, upon consideration whereof, and being fully advised in the premises, the court returns and orders to be entered of record the following special finding of facts, to wit:

Special finding.

The court finds that Edward Sullivan held and acquired the real estate in question, through conveyances from Valois, who inhabited and possessed the same prior to December 20, 1803, and that said Edward Sullivan, and those under whom he claimed, had continuous, open, notorious, and adverse possession under said conveyances for more than thirty years.

11 The plaintiff, Emily Sullivan, was the sister of Edward Sullivan, and the other plaintiff, Jeremiah Sullivan, is the son of Edward Sullivan's brother, deceased.

It is admitted that the plaintiffs are now, and always have been, non-resident aliens, and that no one of them had made a declaration of intention to become a citizen of the United States; therefore, under the laws of Missouri in force at the death of Edward Sullivan, in the year 1866, the plaintiffs were incapable of acquiring the real estate in dispute, especially as there were several aliens resident in the United States who had declared their intentions to become citizens of the United States, and also a resident alien in Missouri, to whom the real estate would descend, subject to the limitations named in the Missouri statutes. The value of the property sued for is over five thousand dollars.

Under the foregoing view of the case, the court finds it unnecessary to pass upon other facts and questions of law presented by defendants.

Judgment.

It is therefore considered by the court that the plaintiffs take nothing by their writ herein, and that the defendants H. Burnett, William H. Burnett, and the German Savings Institution go hence without day, and have and recover of said plaintiffs Emily Sullivan and Jeremiah

Sullivan their costs herein expended, and that a fee bill or execution issue therefor.

And thereupon said plaintiffs, by their attorneys, and file a motion for a new trial herein, which, being by the court considered, it is ordered that said motion be, and the same is hereby, overruled.

And on the same day last aforesaid at said court, the following further proceedings were had in said case, to wit:

EMILY SULLIVAN ET AL., PLAINTIFFS,
vs.
H. BURNETT ET AL., DEFENDANTS.

12 *Bill of exceptions allowed, &c.*

Now come the plaintiffs by their attorneys, and present to the court their bill of exceptions herein, which is allowed, signed, and ordered to be filed and made a part of the record herein; and also present to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said defendants to be and appear at a Supreme Court of the United States, at the next term thereof, on the second Monday of October next, which said writ of error is allowed, and said citation signed by the judge.

Bond appro'd.

And the said plaintiffs also present to the court their bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed.

Which said bill of exceptions is in words and figures following:

Bill of exceptions.

In the circuit court of the United States for the eastern district of Missouri, at the September term, A. D. 1878.

EMILY SULLIVAN AND JEREMIAH SULLIVAN, plaintiffs,
vs.
NATHANIEL K. FAIRBANK ET AL., DEFENDANTS.

Be it remembered that at the term aforesaid of the court aforesaid the above-entitled cause was tried and determined by the court without the intervention of a jury, the parties by their attorneys of record having filed with the clerk a stipulation in writing waiving a jury. Upon said trial, the plaintiffs to sustain the issues on their part offered evidence tending to prove that Edward Sullivan held and acquired the real estate in question through conveyance from Francois Valois, who inhabited, cultivated, and possessed the same prior to December 20, in the year 1803, and said Edward Sullivan, and those under whom he claimed, had continuous, open, notorious, and adverse possession
13 under said conveyances for more than thirty years; that he was a naturalized citizen of the United States, residing in the city of St. Louis, State of Missouri, for many years next preceding his death, which occurred in the year 1866, at which time he owned and possessed

the premises in controversy; that he died intestate, unmarried, and without issue; that his estate was duly administered upon, and the final settlement thereof occurred in September, 1869; that at the date of his death his parents were dead; that he left surviving him one sister, the plaintiff Emily Sullivan, and the plaintiff Jeremiah Sullivan, who is the son of said Edward Sullivan's deceased brother; that all other children and descendants of said Edward Sullivan's parents were dead at the time of his death, except Mary Mowlds, who is the sister of said Jeremiah Sullivan; that the plaintiffs and Mary Mowlds were at that time, and still are, non-resident aliens, having been born and always resided in Ireland, in the United Kingdom of Great Britain and Ireland; that they did not know of the death of Edward Sullivan until about the close of the year 1874; that the value of the property sued for is over five thousand dollars, and the rental value thereof is nine hundred dollars per year, and that the defendants had notice of plaintiffs' claim at the institution of this suit.

The defendants, to sustain the issues on their part, offered evidence tending to prove that, in the year 1869, and after the final settlement of the estate of Edward Sullivan, Rosanna Andoe, who was a first cousin of Edward Sullivan, and the heirs and assigns of Henry Murta, No. 1, deceased, and of Edward Murta, No. 1, deceased, both of whom were children of Annie Murta, another first cousin of Edward Sullivan (as per genealogical table attached), claimed the whole of the property in question as heirs, and as assigns of heirs, of said Edward Sullivan, and brought a suit in partition in the circuit court of St. Louis
14 County, Missouri, returnable to the December, 1869, term of said court, wherein Thomas H. Wilkins, executor of said Henry Murta, No. 1, deceased, Martha Murta, and Joseph Gorla were the only plaintiffs, and Henry Murta, No. 2, Samuel Murta, Edward Murta, No. 2, and Paul Murta, minor children and heirs of Edward Murta, No. 1, deceased, Fidelio C. Sharp, James O. Broadhead, Rasanna Andoe, and William P. Scott, and Thomas W. Elder, committee of Rosanna Andoe (a person of unsound mind), were the only defendants; and said parties, plaintiff and defendant, obtained a decree in partition of said premises, whereby said premises were ordered to be sold at public vendue, and the entire proceeds to be divided between said parties, plaintiff and defendant, in accordance with their respective interest as set out in the pleadings, which orders were carried out, and Patrick E. Fletcher, the grantor of these defendants, purchased said premises at the partition sale, May 28th, 1870.

That afterwards, in the year 1873, Edward Murta, No. 3, John Murta, Ella Leighton, wife of Timothy Leighton, and Eliza Cogsley, wife of Patrick Cogsley, claimed one-half interest in said premises as children of Mary Murta, another first cousin of said Edward Sullivan, and thereupon brought their suit in ejectment in said St. Louis circuit court, returnable to the October term, 1873, of said court, and in December, 1874, recovered judgment for one-half of said premises, against the said Fletcher, who was the sole defendant in said cause; whereupon the German Savings Institution, one of these defendants, acquired said one-half interest by purchase from the prevailing parties in said ejectment suit, by deeds dated June, 1875; that all of said parties to said partition suit, and the plaintiffs in said ejectment, resided in the United States at the date of Edward Sullivan's death, at which time the said Henry Murta, No. 1, was a resident of Missouri, and said Edward
15 Murta, No. 3, John Murta, Timothy Leighton, and Patrick Cogsley were respectively residents of the States of Iowa, Indiana,

and New York, and were also then duly naturalized citizens of the United States, and that said Henry, No. 1, Samuel, Edward, No. 2, and Paul were minor children of Edward, No. 1, a resident of Pennsylvania.

It was admitted that Rasanna Andoe was born in Ireland, and had never been naturalized; that the said Annie Murta, mother of said Henry Muta, No. 1, and Edward Murta, No. 1, and the said Mary Murta, mother of the plaintiffs in said ejectment suit, were living in Ireland aforesaid at the dates of said partition and ejectment suits, and then were, and always had been, non-resident aliens; that the property in controversy is situated in the city of St. Louis aforesaid; that the defendant, the German Savings Institution, holds whatever title was possessed by the said parties to both the aforesaid partition and ejectment suits, and that at the date when this suit was commenced said defendant was, and yet is, in possession of said premises by its tenants, the other defendants.

This was all the evidence offered.

Thereupon the court made the following special findings of fact and rulings as the law applicable thereto, and as controlling the judgment of the court, to-wit:

SULLIVAN ET AL.
vs.
FAIRBANK ET AL.

The court finds that Edward Sullivan held and acquired the real estate in question through conveyances from Valois, who inhabited and possessed the same prior to December 20, 1803, and that said Edward Sullivan, and those under whom he claimed, had continuous, open, notorious, and adverse possession under said conveyances for more than thirty years.

16 The plaintiff, Emily Sullivan, was the sister of Edward Sullivan, and the other plaintiff, Jeremiah Sullivan, is the son of Edward Sullivan's brother, deceased.

It is admitted that the plaintiffs are now, and always have been, non-resident aliens, and that no one of them had made a declaration of intention to become a citizen of the United States.

Therefore, under the laws of Missouri, in force at the death of Edward Sullivan, in the year of 1866, the plaintiffs were incapable of acquiring the real estate in dispute, especially as there were several aliens resident in the United States who had declared their intentions to become citizens of the United States, and also a resident alien in Missouri, to whom the real estate would descend subject to the limitations named in the Missouri statutes.

The value of the property sued for is over five thousand dollars. Under the foregoing view of the case, the court finds it unnecessary to pass upon other facts and questions of law presented by defendants.

Thereupon the court orders judgment for defendants.

To which rulings of the court the plaintiffs, then and there, instantly excepted in the following several particulars:

1st. To so much of said rulings as declared that under the laws of Missouri, in force at the death of Edward Sullivan, in the year 1866, the plaintiffs were incapable of acquiring the real estate in dispute.

2d. To so much of said rulings as declared that said real estate would descend subject to the limitations named in the Missouri statutes, to those several aliens resident in the United States who had declared their intentions to become citizens of the United States, and to that alien resident in Missouri.

3d. To the whole conclusion of the court, as the law of the case
17 upon the facts, that under the laws of Missouri, in force at the death of Edward Sullivan, in the year 1866, the plaintiffs were incapable of acquiring the real estate in dispute, especially as there were several aliens resident in the United States, who had declared their intentions to become citizens of the United States, and also a resident alien of Missouri, to whom the real estate would descend, subject to the limitations named in the Missouri statutes.

4th. To the conclusion of the court that the judgment should be for the defendants.

And afterwards, to wit, during the same term, and within four days after the rendition of said findings and judgment, plaintiffs filed a motion for a new trial; which motion was in the words and figures following, to wit:

Motion for new trial.

UNITED STATES OF AMERICA,
State of Missouri, ss:

In the circuit court for the eastern district of Missouri, September term, A. D. 1878.

EMILY SULLIVAN AND JEREMIAH SULLIVAN, plaintiffs,
vs.
NATHANIEL K. FAIRBANK, ET AL., DEFENDants. } Motion for new trial.

Now come the said plaintiffs, and move the court to set aside the special findings of the court, and judgment entered therein in this cause, and for a new trial, for the following reasons, namely:

1. The conclusions of the court as to the law of the case were not applicable to the facts as found.

2. The court erred in its conclusions that the real estate in controversy would descend or could descend to those aliens, resident in the United States, who had declared their intentions to become citizens of the United States, or to that alien resident in the State of Missouri.

3. The court erred in declaring the law to be that the plaintiffs
18 were incapable of acquiring the real estate in dispute, when the descent was cast in A. D. 1866, upon the death of their ancestor, Edward Sullivan, who died seized thereof.

4. The judgment of the court upon the facts found, should have been for the plaintiffs.

BOYLE & BROCKENBRAGH,
Attorneys for Plaintiffs.

Which motion was afterwards, during the same term, overruled by the court, and thereupon the plaintiffs instantly excepted thereto.

And now, having embodied all of their said several exceptions, in this their bill of exceptions, the plaintiffs present the same in open court, at the aforesaid term, and it is received by the court, and signed and sealed by his honor, the presiding judge, and ordered to be filed and made a part of the record in this cause.

SAMUEL TREAT, *Judge.* [SEAL.]

The said genealogical table referred to and submitted in the evidence and embraced in the bill of exceptions appears as follows, to wit:

Genealogical table submitted by defendants.
Those who personally, and by heirs and assigns, were awarded the property in the partition suit are designated by a *.
Those who recovered in the Murta ejectment suit are designated by a †.

19 And the said bond so approved and filed as aforesaid is in the words and figures to wit:

Bond.

Know all men by these presents that I, John C. Sullivan, am held and firmly bound unto H. Burnett, William H. Burnett, and The German's Savings Institution in the full and just sum of five hundred dollars, to be paid to the said H. Burnett, William H. Burnett, and The German's Savings Institution, their heirs, executors, administrators, or assigns, to which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally by these presents. Sealed with my seal, and dated this second day of December, in the year of our Lord one thousand eight hundred and seventy eight.

Whereas, lately at the September term, 1878, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court, between Emily Sullivan, et al., plaintiffs, and H. Burnett, et al., defendants, judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October next: Now the condition of the above obligation is such that if the said plaintiffs shall prosecute said writ to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

J. C. SULLIVAN. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

20 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto attached to be a true copy of the record and proceedings had in case No. 1170 of Emily Sullivan et al., plaintiffs, against H. Burnett et al., defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 11th day of December, in the year of our Lord eighteen hundred and seventy-eight.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By T. L. CRAWFORD,
Deputy.

(Indorsed:) No. United States circuit court, eastern district of Missouri. against . Duly certified copy of the in the above-entitled cause.

(Indorsement on cover:) No. 225. Emily Sullivan et al., plaintiffs in error, vs. H. Burnett et al. E. Missouri C. C. U. S. Filed 9th August, 1879.

We call attention to the following stipulation, with reference to an accidental error in the bill of exceptions:

IN SUPREME COURT, U. S.

EMILY SULLIVAN, ET. AL.
vs.
H. BURNETT.

It is agreed between counsel in this cause, that there is an accidental error in the bill of exceptions in this, to-wit: That it is stated in the bill of exceptions, that it was admitted that Mary and Annie Murta were living at the date of the ejectment suit of the children of Mary, against Fletcher. The facts as it was intended to put them in the bill of exceptions, were as follows: It was admitted that the said Annie Murta, mother of said Henry Murta, No. 1, and Edward Murta, No. 1, and the said Mary Murta, mother of the plaintiffs in said ejectment suits, were living in Ireland at the date of the death of Edward Sullivan, and then were and had always been non-resident aliens; and the testimony tended to prove that Mary Murta died in June, 1873, and Annie Murta died in 1874.

St. Louis, December 31st, 1881.

L. B. VALLIANT.
For Plaintiff in Error.

G. A. FINKELNBURG.
For Defendants in Error.

15-334

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1881.

NO. 225.

EMILY SULLIVAN et al., Plaintiff in Error,

vs.

H. BURNETT, Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

L. B. VALLIANT,
For Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1881.

NO. 225.

EMILY SULLIVAN ET AL., PLAINTIFFS IN ERROR.

vs.

H. BURNETT ET AL., DEFENDANTS IN ERROR.

ERROR TO CIRCUIT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT OF THE CASE BY PLAINTIFFS IN ERROR.

This was an action of ejectment (or rather an action which under the Missouri code of practice, is equivalent to an action of ejectment), for the possession of certain real estate in the city of St. Louis.

The plaintiffs in error were the plaintiffs below. A jury was waived, and the cause was tried by the court, who rendered special findings as to the facts, and gave judgment for the defendants. In due time a motion for a new trial was made by the plaintiffs and overruled by the court. Exceptions were duly taken to the rulings of the court as to the propositions of law governing its judgment and conclusion of law as governing the case;

which exceptions were duly preserved in a bill of exceptions, which is embodied in the record.

There was no controversy as to the facts.

The land in question belonged to Edward Sullivan, who was a native of Ireland but a naturalized citizen of the United States, and who died in possession of the property in August, 1866 intestate, and without ever having been married.

The parents of Edward Sullivan had died long before his death, and he left living and surviving him the plaintiff, Emily Sullivan, his sister, and the plaintiff, Jeremiah Sullivan and Mary Mowlds, wife of G. F. Mowlds, children of a deceased brother. These were the next of kin to Edward Sullivan and his only heirs at law, unless they were excluded from inheritance under the statute law of Missouri on account of their being aliens and non residents.

The plaintiffs, Emily Sullivan and Jeremiah Sullivan, and also Mary Mowlds, are natives of Ireland and now reside, and have always resided in Ireland, and have never made a declaration of intention to become citizens of the United States.

They did not hear of the death of Edward Sullivan until 1874.

At the time of his death, Edward Sullivan left living in Ireland a number of first cousins, who were also non-resident aliens, and one first cousin, Rosana Ardoe, a lunatic, who was also a native of Ireland and unnaturalized, but a resident of the State of Maryland, but who, it does not appear, had ever declared her intention to become a citizen of the United States. Among the non-resident alien first cousins residing in Ireland, were Annie Murta and Mary Murta, who both had children born in Ireland but residing in the United States, and naturalized, and one of whom, Henry Murta was a resident of Missouri.

Upon the death of Edward Sullivan in 1866, letters of administration were taken out upon his estate by John

Maguire, who administered the estate and made a final settlement thereof in the Probate Court in September, 1869.

In 1869, after the final settlement of the estate of Edward Sullivan deceased, a proceeding for partition of this land was instituted in the Circuit Court of St. Louis County; in which proceeding the aforesaid children of Annie Murta and their heirs and representatives, and the said Rosana Andoe, and her committee, she being a lunatic, were the only parties; they claiming to be the heirs of Edward Sullivan.

Under this proceeding the land was sold by a commissioner appointed by the court, to one Fletcher, and the proceeds divided between the said parties.

Afterwards, in 1873, the children of Mary Murta brought a suit in ejectment against Fletcher for one-half the land and recovered it.

Annie Murta and Mary Murta were both alive at the death of Edward Sullivan, and also at the dates of the aforesaid partition and ejectment suits, and were residing in Ireland.

The defendants in this suit hold whatever title was acquired by Fletcher in that partition proceeding and also whatever title the children of Mary Murta had to that half recovered by them from Fletcher.

The defendants are and were at the institution of this suit in possession of the property. The value of the property in controversy is over $5,000, and its yearly rental value is $900.

The plaintiffs claim as the heirs of Edward Sullivan.

The special finding of the court was in these words:

SUBMISSION.

"And this case coming on to be heard, the same is now submitted to the court without the intervention of a jury, upon the

pleadings, proofs and arguments of counsel, upon consideration whereof, and being fully advised in the premises, the court returns and orders to be entered of record the following special finding of facts, to-wit:

SPECIAL FINDING.

"The court finds that Edward Sullivan held and acquired the real estate in question, through conveyances from Valois, who inhabited and possessed the same prior to December 20, 1803, and that said Edward Sullivan, and those under whom he claimed, had continuous, open, notorious, and adverse possession under said conveyances for more than thirty years.

"The plaintiff, Emily Sullivan, was the sister of Edward Sullivan, and the other plaintiff, Jeremiah Sullivan, is the son of Edward Sullivan's brother, deceased.

"It is admitted that the plaintiffs are now, and always have been, non-resident aliens, and that no one of them had made a declaration of intention to become a citizen of the United States; therefore, under the laws of Missouri in force at the death of Edward Sullivan, in the year 1865, the plaintiffs were incapable of acquiring the real estate in dispute, especially as there were several aliens resident in the United States who had declared their intentions to become citizens of the United States, and also a resident alien in Missouri, to whom the real estate would descend, subject to the limitations named in the Missouri statutes. The value of the property sued for is over five thousand dollars.

"Under the foregoing view of the case, the court finds it unnecessary to pass upon other facts and questions of law presented by defendants.

JUDGMENT.

"It is therefore considered by the court that the plaintiffs take nothing by their writ herein, and that the defendants, H. Burnett, William H. Burnett, and the German Savings Institution go hence without day, and have and recover of said plaintiffs, Emily Sullivan and Jeremiah Sullivan their costs herein expended, and that a fee bill or execution issue therefor."

The questions presented by the record are,

1. Did the statutes of Missouri in reference to non-resident aliens preclude the plaintiffs from acquiring the property, they being otherwise entitled to the inheritance?

2. If the plaintiffs on account of their non-residence and alienage were incapable of inheriting the property, what became of it?

3. What effect did the Missouri statute of March, 1872, have on the rights of the parties?

4. What effect did the fact have on the rights of the defendants grantors that the mothers of said grantors through whom they claimed to inherit were at the time living in Ireland?

ERRORS.

The court below erred

1. In deciding that under the laws of Missouri in force at the death of Edward Sullivan, in the year 1866, the plaintiffs were incapable of acquiring the real estate in dispute.

2. In deciding that the said real estate descended subject to the limitations named in the Missouri statutes to the aliens resident in the United States who had declared their intentions to become citizens, and to that alien resident in Missouri.

3. In its conclusion as to the law of the case upon the facts, that under the laws of Missouri in force at the death of Edward Sullivan, in the year 1866, the plaintiffs were incapable of acquiring the real estate in dispute, especially as there were several aliens resident in the United States, who had declared their intentions to become citizens of the United States, and also a resident alien of Missouri, to whom the real estate would descend, subject to the limitations named in the Missouri statutes.

4. In its conclusion that the judgment should be for the defendant.

ARGUMENT.

Both plaintiffs and defendants claim title through Edward Sullivan, who was the common source; the plaintiffs being his sister, and nephew, son of a deceased brother, claiming as his heirs, and the defendants claiming as the grantees of cousins, who they claim were his heirs and who, for convenience, we will hereinafter call the Murtas, embracing under that designation all the cousins under whom defendants claim.

By the common law, on the death of Edward Sullivan, neither the plaintiffs nor the cousins were entitled to the inheritance, because they were all aliens; and those second cousins, who resided in the United States, and were naturalized, traced their descent through aliens, and hence there was no inheritable blood.

Whatver rights either class, therefore, had were derived from the Statutes of Missouri. The following are copies of the Missouri Statutes upon which the rights of the parties to this suit depend:

Gen'l Statutes of Missouri, 1865. Title XXVIII. Chapter 110, p. 448.

SECTION 1. All aliens residing in the United States, who shall have made a declaration of their intention to become citizens of the United States, by taking the oath required by law, and all aliens, residents of this State, shall be capable of acquiring real estate in this State, by descent or purchase, and of holding and alienating the same, and shall incur the like duties and liabilities in relation thereto, as if they were citizens of the United States.

Sec. 2. It shall be lawful for every alien, who, except for his alienage, would be capable of acquiring real estate by devise or descent from any person thereafter dying, capable of holding,

at the time of his death, real estate in this State, to sell and convey, in the manner provided by law for the conveyance of real estate any real estate which he may acquire by virtue of this section, to any other person capable of holding real estate by virtue of the laws of this State; and such sale and conveyance, when executed and delivered in the manner provided, shall have the effect to pass all the title to any real estate which such alien may have acquired to the same, by descent or devise.

Sec. 3. All such sales and conveyances shall be null and void, unless made in good faith within three years next after the final settlement of the estate of the ancestor or devisor; *provided*, that if such real estate be in litigation between such alien and any other person, then such real estate, or so much thereof as shall have been in litigation, shall be sold and conveyed within three years after the termination of such litigation.

Sec. 4. When any such real estate is or shall be held under any lease, or any grant or devise of any estate, other than fee simple, to any person other than such alien, or charged with a liability for any debts, expenses, the education, support or maintenance of any person, and such lease, grant, devise or charge is or shall be by or under any person under or through whom such alien does or shall derive title to such estate, the three years within which, under this chapter, a sale may be validly made of such estate by such alien or his representative, shall not be deemed to have commenced before the termination of every such charge, liability, leasehold or other estate of or in favor of any such person aforesaid, other than such alien, nor before the final settlement of the estate of any such person aforesaid, in whose favor any such charge or liability does or shall exist, when such charge or liability shall not have ceased to exist before the death of such person.

Sec. 5. If any such alien be a minor, by the laws of this State, his guardian or curator, duly appointed and qualified as directed by law, shall have power to sell and convey, within the time limited by the third section of this chapter, any real estate which such minor may acquire by virtue hereof; and it shall be the duty of such guardian or curator, upon the receipt of the purchase money thereof, to account for the same to the court having jurisdiction of his guardianship or curatorship.

After this came the act of March 30, 1872, as follows:

SECTION 1. Aliens shall be capable of acquiring, by purchase, devise or descent, real estate in this State, and of holding, devising or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States, and residents of this State.

SEC. 2. Any female born in the United States, owning real estate or any interest therein in this State, who shall marry an alien and reside in a foreign country, may, at any time, notwithstanding such marriage or residence, convey such real estate, or any interest therein, by deed, or may at any time devise the same by last will: *Provided* the same be done in either case in conformity with the general laws of this State concerning the conveyance of real estate by deed and the making of wills.

SEC. 3. Chapter one hundred and ten of title twenty-eight of the General Statutes of Missouri, being chapter five of Wagner's Missouri Statutes, and an Act entitled 'An Act to amend chapter one hundred and ten of title twenty-eight of the General Statutes concerning real property and its alienation,' approved March 13, 1867, are hereby repealed.

SEC. 4. This act shall take effect on the fourth day of March, in the year eighteen hundred and seventy-two.

Chapter 129, General Statutes, p. 517:

OF DESCENTS AND DISTRIBUTIONS.

SECTION 1. When any person having title to any real estate of inheritance, or personal estate undisposed of, or otherwise limited by marriage settlement, shall die intestate as to such estate, it shall descend and be distributed in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower in the following course: First, to his children or their descendants in equal parts; second, if there be no children or their descendents, then to his father, mother, brothers and sisters and their descendants in equal parts; third, if there be no children or their descendants, father, mother, brother or sister, nor their descendents, then to the husband or wife: if there be no husband or wife, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal

parts; fourth, if there be no children or their descendants, father, mother, brother, sister, or their descendants, husband or wife, grandfather, grandmother, uncles, aunts, nor their descendants, then to the great grandfathers, great grandmothers and their descendants in equal parts; and so on in other cases without end, passing to the nearest lineal ancestors and their children and their descendants in equal parts. * * *

Sec. 8. In making title by descent it shall be no bar to a demandant that any ancestor through whom he derives his descent from the intestate, is or has been, an alien.

The other sections of this chapter have no influence on this case and are therefore omitted.

The first point to which we would ask the attention of the court is the decision of the court below that upon the death of Edward Sullivan, the property descended to those aliens resident in the United States, the cousins who had declared their intention to become citizens, and the alien resident of Missouri.

This we submit was error.

The persons embraced in this class were the children of Mary Murta and Annie Murta, both of whom were non-resident aliens and *living at the time of the death of Edward Sullivan*, and also at the date of the partition proceedings between their children.

We do not question the principal of common law that when the person who, but for his alienage, would be the heir, is an alien, the inheritance passes by him to more remote heirs until it comes to one capable of inheriting.

In such case, since the alien cannot hold the property, the law *quae nihil frustra*, will not give him the inheritance only to take it away, and therefore takes no notice of him, treats the case as though he never existed, *ignores him entirely*, and passes on to next of kin capable of inheriting. But if this remote kin cannot trace his heirship except through the person ignored, he cannot trace it

at all, for such person must be regarded as though he never existed.

Jackson v. Lunn, 3 Johns, cases 121.

Thus, whilst under this rule the inheritance *passes by* an heir it never passes *through* one.

2 Kent, 56, 12th Ed.

Jackson v. Green, 7 Wen. 333—see p. 338.

If therefore the plaintiffs were incapable of inheriting, the inheritance would pass by them to the Murta cousins, but arriving at them they would be found also incapable of inheriting, because they were also non-resident aliens, to-wit: Mary and Annie Murta.

The error the court then fell into, was in passing the title *through them* unto their children residing in America. The title could not reach these children in America if it *passed by* their mothers in Ireland; it could only reach the children by *passing through* the mothers.

It will be observed that the lunatic cousin, Rosana Andoe, who was residing in Maryland, and who was a sister of Annie and Mary Murta, is not included in the class to whom the court below decided that the property descended; which class embraces only those aliens resident in the United States, who had declared their intention to become citizens (which Rosana never did), and that alien who resided in Missouri. As between Rosana and the children of Mary and Annie, that distinction was properly drawn, since the statute which the court had in view (§ 1 Chap. 110 Rev. Stat. 1865, *supra*), itself draws the distinction.

But the decision of the court below that the property descended to those children of Annie and Mary, is based on that court's construction of Sec. 8, Chap. 129, Rev. Stats. 1865, which is in these words:

In making title by descent it shall be no bar to a demandant that any ancestor through whom he derives his descent from the intestate, is or has been an alien.

Under this statute, *if* the plaintiffs were incapable of taking, and if the mothers of the Murtas had not been living, the Murtas here would have inherited. This statute does not enable one to *inherit through a living ancestor*.

The language of the statute "*is* or has been an alien," certainly contemplates that the ancestor through whom he derives descent from the intestate may be living; as for example: a brother may inherit from a brother though the father, through whom he derives his descent from his intestate brother, may be living and an alien. But in that case the *inheritance* comes not through the father, but directly from the brother, although the *descent* is derived through the father.

Jackson v. Green, 7 Wen. 333.

This statute is the same in substance as that of 11 and 12 Will. III Ch. 6, which this court has more than once construed, and the above views conform to that construction.

McCreery v. Somerville, 9 Wheat. 354.
McKinney v. Saviegno, 18 How. 235.

The Supreme Court of Missouri has never been called upon to construe this statute.

But the courts of last resort in other States have given it the same construction that this court has given it.

Jackson v. Green, 7 Wen. 333, see p. 339.
The People v. Irvin, 21 Wen. 128.
2 Kent's Com. 55.

The language of the statute 11 and 12 Will. III., Chap. 6, is equivalent to the language of the Missouri statute under consideration, referring to the alien ancestor who

is to make the connecting link, in the present and past tenses. The language of the English statute as quoted in McCreery v. Somerville, 9 Wheat. 354, is inaccurate, as it omits the words " or is or are " after the words "were or was." This was probably a typographical error. The language of the English statute is as follows:

> That all and every person or persons, being the king's natural born subject or subjects within any of the kings realms or dominions, shall and may hereafter lawfully inherit and be inheritable as heir or heirs to any honors, manors, lands, tenements or heraditments, and make their pedigrees and titles by descent, from any of their ancestors, lineal or collateral, although the father or mother, fathers or mothers or other ancestor of such person or persons, by, from, through or under whom he, she or they shall or may make or derive their title or pedigree, were or was, or is or are, or shall be born out of the king's allegiance, and out of his majesty's realms, etc."
>
> British Statutes at Large, Vol. X 319.

We conclude then that if the plaintiffs were incapable of inheriting the property on account of their alienage, the title passed by them, seeking an heir until it came to Mary and Annie Murta, who were found to be also non-resident aliens, and to their sister, Rosana Andoe (who though a resident of Maryland, was yet an alien without having declared her intention to become a citizen, and who therefore did not come within either class of aliens provided for in § 1, Chap. 110, R. S. 1865, *supra*)) all of whom were incapable of inheriting, and since it could not pass through Mary and Annie, living, to their children, it escheated to the State.

This consideration, we think, disposes of the defendants claim of title and leaves the title question between the plaintiff and the State.

We have been lead into the discussion of the question as to the right of the Murta cousins to inherit the property in case the sister and nephew were incapable, from

the fact that the court below seemed to regard it as important, holding that the plaintiffs were incapable, "especially" as there were those (to-wit, the Murta's) who were capable and to whom the real estate would descend: (R. p. 8), seeming to think that the capacity of the latter ought to affect the question of the capacity of the former.

And we have also endeavored to demonstrate that the Murtas had no title, in order to reduce the question of title to one between the State and plaintiffs.

But it is manifest that if the plaintiffs *were capable of inheriting*, as we contend, under the provisions of the Statutes which we shall now proceed to discuss, then the Murtas obtained no title whether we have or have not correctly interpreted § 8 of the chapter on Descents, which is the same in substance as 11 and 12 Will. III, ch. 6.

We come now to the consideration of what we regard the main question in this case, viz: What are the plaintiffs rights under the various Statutes above quoted?

The Supreme Court of Missouri has never, so far as we are aware, construed these Statutes, or had them under consideration; this is the first case that has called for their judicial interpretation.

Statutes somewhat similar in other States have received judicial interpretation, as will hereinafter be shown.

The case of Wacker v. Wacker, 26 Mo. 426, decides that a non-resident alien cannot take land by descent in Missouri; but in that case the intestate died in 1853, before the Statute which is embodied in substance in §§ 2, *et seq.*, chap. 110 G. S. 1865, was enacted, and hence is no authority.

The provisions of sec. 1, chap. 110, G. S., 1865, had been the Statute Law of Missouri since 1845, but the provisions of secs. 2, 3 and 5 were not enacted until February 22, 1855, under the act of that date, entitled "*An Act in behalf of alien heirs and devisees.*"

These two acts were in substance united in one act in the Gen. Stat. 1865, and sec. 4 then added, forming chapter 110, *supra*, which was in force at the death of Edward Sullivan.

It must be admitted that the language of this Statute is not as well chosen as it might have been, and it is, therefore not entirely free from difficulty. It is evident, however, that it was the general intention of the act to confer upon aliens certain rights which they did not have before.

The construction that we contend for is that it conferred upon non-resident aliens the right to take real estate by descent or devise, subject to a defeasance and forfeiture to the State, unless they sold it to some person capable of holding it, within the time prescribed in the 3d section.

If we correctly understand the interpretation put upon it by the court below, and that which is now contended for by defendants, it is that it conferred no right or ability to take title at all, but only a naked power to sell, which power lasted for a period.

This is one of that class of Statutes intended to give relief to a certain class, and it must receive a liberal construction.

The rules of construction of Statutes require us to ask, what was the common law on the subject, what was it the Legislature desired to change, what difficulty did they desire to remove?

If it were not for certain *personal disabilities* which the common law imposed as a consequence of alienage, the act would be absolutely meaningless and aimless. The intention then was to remove, for certain purposes, those personal disabilities, and to let the alien take the property subject to the limitations imposed in the act. If we may be allowed to borrow a figure from pleading, it was an act *in personam* and not *in rem*, it was to affect the person of the alien and not to affect the property.

The alienage, as it were, covered the person and prevented the title from entering into him. The intention of the act was to remove that cover and let the title take its natural course with the condition imposed thereon that it should be disposed of within a period.

An alien at common law could take land by purchase or devise and hold it until office found. This Statute seems to recognize the right of an alien to take by descent in the same manner that he could by devise; it puts the heir and devisee on the same footing. Now, if the construction claimed by the defendants be correct, the alien devisee is deprived of his common law rights, and the title to his property, immediately on the death of his testator, goes to the State, and he has only a naked power to sell within a certain period. Such was certainly not the intention of the Legislature as to devisees, yet the same words apply at the same time to both heirs and devisees.

There are no words in the act explicitly conferring upon a non-resident alien the right to inherit, but such words are not necessary when from the whole act the intention may be gathered.

An Indiana Statute provided that "No person except a citizen of the United States or an alien who shall be at the time a *bona fide* resident of the United States, shall take, hold, convey or pass by descent, lands, except in such cases of descent or devise as are provided for by law." This Statute in terms only forbade a certain class of persons to take and hold lands, and that too a class who were already disqualified from holding land by the common law; yet the Supreme Court of Indiana held that it removed the disabilities of a resident alien and conferred upon him the right to inherit and hold lands.

Murry v. Kelly, 27 Ind. 42.

The Indiana Statute, in express terms, conveyed no more rights than does the Missouri Statute, but they both *recognize certain rights as existing* which did not exist before the passage of that act; the Legislature then conferred the right by passing a law recognizing its existence. The Legislature having the power to create the right, brought it into existence by recognizing that it did exist.

By the language of this Missouri Statute we observe, first, that alien heirs and devisees are recognized as standing in the same attitude in relation to their ability to take and hold real estate.

At common law their rights in this respect were very different. Upon the death of an intestate leaving only alien heirs, his real estate escheated immediately to the State; but when a testator devised his property to an alien, the title passed under the devise to the alien and he could hold it until the State caused an inquisition to be held, and the title divested by judicial proceedings.

Now, as this Statute was an enabling act, it could not be construed to drag the devisee down to the level of the heir; but since by its manifest intention expressed in its recognition of the fact, it puts the heir and devisee on the same plain—it elevates the heir to the position of the devisee. The Legislature conferred upon heir and devisee the right to sell and pass a good title, presuming that there was in them a defeasable title and thus to extinguish the State's right to the defeasance.

If the Statute treated only of the rights of an alien devisee, there would be no question as to the intention and meaning.

Assuming the fact that there was a defeasable title in the alien, (as there was in case of devisee) it is perfectly clear that it was intended to enable him to do an act that would cut off the defeasance.

It is manifest the Legislature did not intend to make

one law for the heir and another for the devisee, but assuming that they both had a certain right, it conferred authority to render that right more effectual.

The power expressly conferred is "to sell and convey in the manner provided by law for the conveyance of real estate, any real estate which he may acquire by virtue of this section," etc.

In these last words is a distinct recognition that "he may acquire real estate *by virtue of this section*," and we must discard these words as altogether meaningless if we do not give them that interpretation. And again, those words, last quoted, though applied to both heirs and devisees, really affected only the heir, since the devisee could acquire the property at common law.

But how shall he convey? In the form of one executing a power? No: "in the manner provided by law for the conveyance of real estate, any real estate which he may acquire by virtue of this section:" that is to say, as any other man may convey his own property; again recognizing the title to be in him

The Statute law of Missouri at that time provided and still provides that the words "grant, bargain and sell," used in a conveyance without restriction, should be construed to mean that the grantor was seized of an indefeasable estate in fee simple. Such a conveyance he was authorized to make and such obligation in relation to the same, to assume.

Gen. Stat Mo., 1865, chap. 109, § 8, p. 444.

Again: "And such sale and conveyance, when executed and delivered in the manner provided, shall have the effect *to pass all the title to any real estate which such alien may have acquired to the same by descent or devise.*"

Now, unless by virtue of this section the alien could acquire title by descent, the conveyance he was author-

ized to make passed no title. If he was executing, as the court below thought, a mere power, it would be a power to convey the title acquired by the State by escheat. But this section does not give him the power to make a conveyance that will pass the State's title, but only such title as he himself acquired by descent.

Unless this Statute gave the alien heir the right to take the property by descent, then, immediately on the death of the intestate, the title vested in the State. If the title vested in the State, it could not be conveyed by the alien under the power given in the Statute, for that Statute, although it gives the alien heir power to convey, yet it expressly limits the conveyance to the title the alien had, if any, and not the title the State had.

If, on the contrary, the Statute is interpreted to empower the alien to take a defeasible or qualified title, then there is no absurdity in the act, no abortion in the right conferred, no snare laid for a purchaser.

The Legislature simply recognizes the title to be in the heir, subject to be defeated by the State on office found, and confers upon the heir and devisee the power to do an act which will pass his own title and also cut off the defeasance.

The third section of the Statute is in the same spirit and senseless with any other interpretation. It provides that the conveyance shall be made within a certain time, and "*provided*, that if such real estate be in litigation between such alien and any other person, then such real estate, or so much thereof as shall have been in litigation, shall be sold and conveyed within three years after the termination of such litigation."

Here is a recognition of the alien's right to litigate for property coming to him by descent; and not only that, but it contemplates a successful litigation and provides that he shall convey that which he may recover within a certain period.

The language of the fifth section is significant of the same intention.

We conclude, then, that by virtue of the Statute we have just been considering, upon the death of Edward Sullivan, the title to the property passed to the plaintiffs, subject to the right of the State to claim it as an escheat, unless the plaintiff sold it within three years from final settlement of the estate of Edward Sullivan. This final settlement occurred in September, 1869.

In March, 1872, before the three years elapsed, the Legislature passed the Statute of that date, set forth above, removing all disabilities on account of alienage and enabling aliens to take and hold real estate as unreservedly as a citizen might.

The effect of this act was to enable the plaintiffs to hold real estate, which by the former Statute he might acquire but not hold indefinitely.

When the Legislature passed the act of 1872, it must have interpreted the former Statute as we have done, because the third section of that act repeals entirely chapter 110, Rev. Stat., 1865. It makes no provision to preserve the rights of aliens under section 2, chap. 110, who had not then made the conveyance, but abolishes those rights entirely. It cannot be presumed that the Legislature intended to cut short those rights without any relief. Such a construction of the act of 1872 would be at variance with the spirit of the act itself, which was to put aliens on an equal footing with native citizens. The Legislature evidently thought, when it adopted the section repealing the act which conferred those rights, that no act was necessary to preserve those rights, since the repealing act merged the lesser into the greater rights, the restricted into the unrestricted.

If our construction of sec. 2, c. 110, G.S., 1865, is correct then the plaintiffs' right to recover is perfect against these defendants, even if the act of 1872 had not been passed. For if the title passed to them on the death of Edward

Sullivan, it was defeasible only at the suit of the State and could not be questioned by any one else.

Osterman v. Baldwin, 6 Wal. 121.

Since we can find no decision of the Supreme Court of Missouri construing these Statutes, let us see how similar Statutes in other States have been construed.

We have already seen how that the Supreme Court of Indiana has construed a Statute as conferring rights on certain aliens which in its terms only recognized that such rights existed.

Murray v. Kelly, 27 Ind. 42.

The Constitution of Texas, 1836, contained the following provision:

"No alien shall hold land in Texas except by titles "eminating directly from the Government. But if any "citizen of this Republic should die intestate or other-"wise, his children or heirs shall inherit his estate, and "aliens shall have a reasonable time to take possession "and dispose of the same in a manner hereafter to be "pointed out by law."

See Texas Const., 1836, Gen'l Prov., § 10.

Now, it must be observed that there is no express provision in that section for aliens to take land by descent, even to hold it for a limited period. The first declaration is that no alien shall *hold* land except by title eminating directly from the Government. The second declaration is that any *citizen* dying his children or heirs shall inherit his estate. If we confine ourselves to the letter of this law, we might be compelled to say that if a citizen died his children, whether aliens or citizens, should inherit his estate, but we cannot say that his *heirs*, whether citizens or aliens, should inherit his estate. "Heirs" is a technical word and signifies those who, under the laws

of the State, inherit the real estate of an intestate. "Children" has a natural and more limited meaning.

In Missouri at the time of the death of Edward Sullivan, if a man should die intestate, it was the law in effect, as in the language of the Texas constitution, "his heirs shall inherit his property," and who should be those heirs was set forth in the chapter on descents.

Though the written law of a State declare that a man's heirs shall inherit his property, it does not mean than an alien may be an heir, nor does it remove the disability of alienage. Therefore there is nothing in the language of the Texas Constitution *expressly* conferring on aliens the right to take by descent even for a limited time. Taking the sentence above quoted in connection with the sentence following, and the most that can be said of it, is that it *recognizes* the rights of aliens to inherit, and imposes a limitation or qualification on that right.

Then came the act of March 18, 1848, § 9, which after first enacting in substance the Act 11 and 12 Will. III, Ch. 6, provides: "And every alien to whom any land may "be devised or may descend, shall have nine years to be- "come a citizen of the republic and take possession of such "land; or shall have nine years to sell the same before "it shall be declared to be forfeited, or before it shall "escheat to the government."

Hart Dig. Art. 600..
1 Pasch. Dig. L. Art. 44.

Now taking this clause of the constitution and the statute together, there is nothing in them conferring upon aliens expressly the right to inherit land; and the recognition of that right is not more clear than it is in the Missouri statute, which we have been considering. Yet the Supreme Court of Texas has held that the effect of these provisions was to change the rule of the common law, which excluded aliens from inheritance of lands so as to

create a defeasible estate by descent in the heirs of a citizen of the republic dying intestate or otherwise; and that upon the death of the owner leaving alien heirs, the title instantly vested in his heirs, subject to be defeated if they should fail to become citizens or fail to sell within the prescribed time.

Barclay v. Cameron, 25 Tex. 232.

And in another case that came before that court, where the title had descended to a citizen of Arkansas, and before the nine years were out Texas was annexed to the Union, the court held that the title became perfect and indefeasible by operation of the law of annexation.

Cryer v. Andrews, 11 Tex. 170.

The act of annexation did for the heir in that case what the Missouri act of 1872 did for the plaintiffs in this case: it removed the disqualification of alienage and operated to convert an estate which before was defeasible into an indefeasible estate.

This court has declared the same principal as that in the case last cited in

Osterman v. Baldwin, 6 Wal. 116

Rouconillat v. Samvain, 32 Cal. 376.

There is more similarity in this Texas statute to the Missouri statute we are considering than there is in that of any other State so far as our examination has enabled us to judge.

Independent of any of these statutes which we have been considering, if an alien, at common law, had taken land by purchase or devise, his title was liable to be defeated by a proceeding on the part of the State; but if before office found, the alien became naturalized, the effect of the naturalization was retroactive and his title by that act became indefeasible.

Jackson v. Green, 7 Wen. 333, see p. 335.

The act of March, 1872, placed these plaintiffs in the same condition as to their right to acquire *and hold* land as if they had been naturalized.

Hence that act as to these plaintiffs was retroactive to the extent that it made their title, which before was defeasible, indefeasible.

It will be perceived from the record in this cause, p. 8, that the court below confined itself to the consideration of the points we have herein above discussed, and based its judgment alone on its opinion of those points. We are not aware that the record presents any other question for discussion.

L. B. VALLIANT,

For Plaintiffs in Error.

St. Louis, Dec., 1881.

IN THE

Supreme Court of the United States

EMILY SULLIVAN, ET AL.,
Plaintiffs in Error,

vs. No. 225.

H. BURNETT, ET AL.,
Defendants in Error.

Statement and Brief for Defendants in Error.

FINKELNBURG & RASSIEUR,
With whom is E. C. KEHR,
For Defendants in Error.

IN THE

Supreme Court of the United States

EMILY SULLIVAN, ET AL.,
Plaintiffs in Error,
vs.
H. BURNETT, ET AL.,
Defendants in Error.
No. 225.

Statement and Brief for Defendants in Error.

STATEMENT.

This was an action in ejectment, brought to the March term, 1878, of the U. S. Circuit Court, for the Eastern District of Missouri, by Emily Sullivan, Jeremiah Sullivan and Mary Mowlds (born Sullivan), against the defendants in error, for a lot of ground in the city of St. Louis. The case was afterwards dismissed as to Mary Mowlds.

At the trial plaintiffs, to sustain the issues on their part, offered evidence tending to prove that Edward Sullivan held and acquired the real estate in question through conveyance from Francois Valois, who inhabited, cultivated and possessed the same prior to December 20th, in the year 1803, and said Edward Sullivan, and those under whom he claimed, had continuous, open, notorious and adverse possession under said conveyances for more than thirty years; tha the

was a naturalized citizen of the United States, residing in the city of St. Louis, State of Missouri, for many years next preceding his death, which occurred in the year 1866, at which time he owned and possessed the premises in controversy; that he died intestate, unmarried and without issue; that his estate was duly administered upon, and the final settlement thereof occurred in September, 1869; that at the date of his death his parents were dead; that he left surviving him one sister, the plaintiff Emily Sullivan, and the plaintiff Jeremiah Sullivan, who is the son of said Edward Sullivan's deceased brother; that all other children and descendants of said Edward Sullivan's parents were dead at the time of his death, except Mary Mowlds, who is the sister of said Jeremiah Sullivan; that the plaintiffs and Mary Mowlds were at that time, and still are, non-resident aliens, having been born and always resided in Ireland, in the United Kingdom of Great Britain and Ireland; that they did not know of the death of Edward Sullivan until about the close of the year 1874; that the value of the property sued for is over five thousand dollars, and the rental value thereof is nine hundred dollars per year; and that the defendants had notice of plaintiffs' claim at the institution of this suit.

The defendants, to sustain the issues on their part, offered evidence tending to prove that, in the year 1869, and after the final settlement of the estate of Edward Sullivan, Rosanna Andoe, who was a first cousin of Edward Sullivan, and the heirs and assigns of Henry Murta, No. 1, deceased, and of Edward Murta, No. 1, deceased, both of whom were children of Annie Murta, another first cousin of Edward Sullivan (as per genealogical table attached), claimed the whole of the property in question as heirs, and as assigns of heirs, of said Edward Sullivan, and brought a suit in partition in the Circuit Court of St. Louis county, Missouri, returnable

to the December, 1869, term of said Court, wherein Thomas H. Wilkins, executor of said Henry Murta, No. 1, deceased, Martha Murta and Joseph Gorla were the only plaintiffs, and Henry Murta, No. 2, Samuel Murta, Edward Murta, No. 2, and Paul Murta, minor children and heirs of Edward Murta, No. 1, deceased, Fidelio C. Sharp, James O. Broadhead, Rosanna Andoe, and William P. Scott, and Thomas W. Elder, committee of Rosanna Andoe (a person of unsound mind), were the only defendants; and said parties, plaintiff and defendant, obtained a decree in partition of said premises, whereby said premises were ordered to be sold at public vendue, and the entire proceeds to be divided between said parties, plaintiff and defendant, in accordance with their respective interest, as set out in the pleadings, which orders were carried out, and Patrick E. Fletcher, the grantor of these defendants, purchased said premises at the partition sale, May 28th, 1870.

That afterwards, in the year 1873, Edward Murta, No. 3, John Murta, Ella Leighton, wife of Timothy Leighton, and Eliza Cogsley, wife of Patrick Cogsley, claimed one-half interest in said premises, as children of Mary Murta, another first cousin of said Edward Sullivan, and thereupon brought their suit in ejectment in said St. Louis Circuit Court, returnable to the October term, 1873, of said Court, and in December, 1874, recovered judgment for one-half of said premises, against the said Fletcher, who was the sole defendant in said cause; whereupon the German Savings Institution, one of these defendants, acquired said one-half interest by purchase from the prevailing parties in said ejectment suit, by deeds dated June, 1875; that all of said parties to said partition suit, and the plaintiffs in said ejectment, resided in the United States at the date of Edward Sullivan's death, at which time the said Henry Murta, No. 1, was a resident of Missouri, and said Edward Murta, No. 3,

John Murta, Timothy Leighton, and Patrick Cogsley, were respectively residents of the States of Iowa, Indiana and New York, and were also then duly naturalized citizens of the United States, and that said Henry, No. 1, Samuel, Edward, No. 2, and Paul were minor children of Edward, No. 1, a resident of Pennsylvania.

It was admitted that Rosanna Ardoe was born in Ireland, and had never been naturalized; that the said Annie Murta, mother of said Henry Murta, No. 1, and Edward Murta, No. 1, and the said Mary Murta, mother of the plaintiffs in said ejectment suit, were living in Ireland, aforesaid, at the date of the death of Edward Sullivan, and then were, and always had been, non-resident aliens; and the testimony tended to prove that Mary Murta died in June, 1873, and Annie Murta died in 1874; that the property in controversy is situated in the city of St. Louis, aforesaid; that the defendant, the German Savings Institution, holds whatever title was possessed by the said parties to both the aforesaid partition and ejectment suits; and that at the date when this suit was commenced, said defendant was, and yet is, in possession of said premises by its tenants, the other defendants.

This was all the evidence offered.

Thereupon the Court made the following special findings of fact and rulings as the law applicable thereto, and as controlling the judgment of the Court, to-wit:

SULLIVAN, ET AL.,
vs.
FAIRBANK, ET AL.

The Court finds that Edward Sullivan held and acquired the real estate in question through conveyance from Valois, who inhabited and possessed the same prior to December

20th, 1893, and that said Edward Sullivan, and those under whom he claimed, had continuous, open, notorious and adverse possession under said conveyances for more than thirty years.

The plaintiff, Emily Sullivan, was the sister of Edward Sullivan, and the other plaintiff, Jeremiah Sullivan, is the son of Edward Sullivan's brother, deceased.

It is admitted that the plaintiffs are now, and always have been, non-resident aliens, and that no one of them had made a declaration of intention to become a citizen of the United States.

Therefore, under the laws of Missouri, in force at the death of Edward Sullivan, in the year of 1866, the plaintiffs were incapable of acquiring the real estate in dispute, especially as there were several aliens resident in the United States, who had declared their intentions to become citizens of the United States, and also a resident alien in Missouri, to whom the real estate would descend, subject to the limitations named in the Missouri statutes.

The value of the property sued for is over five thousand dollars. Under the foregoing view of the case, the Court finds it unnecessary to pass upon other facts and questions of law presented by defendants.

Thereupon the Court orders judgment for defendants.

To which rulings of the Court the plaintiffs then and there instantly excepted, in the following several particulars:

1st. To so much of said rulings as declared that under the laws of Missouri, in force at the death of Edward Sullivan, in the year 1866, the plaintiffs were incapable of acquiring the real estate in dispute.

2d. To so much of said rulings as declared that said real estate would descend subject to the limitations named

in the Missouri statutes, to those several aliens resident in the United States, who had declared their intentions to become citizens of the United States, and to that alien resident in Missouri.

3d. To the whole conclusion of the Court, as the law of the case upon the facts, that under the laws of Missouri, in force at the death of Edward Sullivan, in the year 1866, the plaintiffs were incapable of acquiring the real estate in dispute, especially as there were several aliens resident in the United States, who had declared their intentions to become citizens of the United States, and also a resident alien of Missouri, to whom the real estate would descend, subject to the limitations named in the Missouri statutes.

4th. To the conclusion of the Court that the judgment should be for the defendants.

A motion for new trial having been filed by plaintiffs, and overruled, the cause was brought to this Court by writ of error.

POINTS.

I.

At common law an alien has no inheritable blood whatever, and no capacity to take by descent. Whatever rights the plaintiffs in this action acquired as kindred to Edward Sullivan, were such as the Statutes of Missouri in force at the time of his death conferred upon them in derogation of the common law.

2 Blackstone's Com., p. 249;
Wacker *vs.* Wacker, 26 Missouri, Rep. 426;
Orr *vs.* Hodgson, 4 Wheaton, 453.

II.

When Edward Sullivan died, (August, 1866,) the law of Missouri governing the acquisition of real estate by aliens, by descent or purchase, was as follows:

Chapter 110, General Statutes of Missouri, 1865, (p. 448.)

Of the acquisition and conveyance of real estate by aliens.

SECTION 1. All aliens residing in the United States, who shall have made a declaration of their intention to become citizens of the United States, by taking the oath required by law, and all aliens, residents of this State, shall be capable of acquiring real estate in this State, by descent or purchase, and of holding and alienating the same, and shall incur the like duties and liabilities in relation thereto, as if they were citizens of the United States.

SECTION 2. It shall be lawful for every alien, who, except for his alienage, would be capable of acquiring real estate by devise or descent from any person thereafter dying, capable of holding, at the time of his death, real estate in this State, to sell and convey, in the manner provided by law for the conveyance of real estate any real estate which he may acquire by virtue of this section, to any other person capable of holding real estate by virtue of the laws of this State; and such sale and conveyance, when executed and delivered in the manner provided, shall have the effect to pass all the title to any real estate which such alien may have acquired to the same, by descent or devise.

SECTION 3. All such sales and conveyances shall be null and void, unless made in good faith within three years next after the final settlement of the estate of the ancestor or devisor; *provided*, that if such real estate be in litigation between such alien and any other person, then such real estate, or so much thereof as shall have been in litigation, shall be sold and conveyed within three years after the termination of such litigation.

Sections 4 and 5 of the statute relate to leaseholds and minors, and are not here inserted because they do not appear to have any application to the case at bar. Section 1 of this statute has been the law of Missouri almost since its first organization as a State, (see Revised Statutes of Missouri, 1835, p. 66 and 1825, p. 126) but the rights conferred by sections 2 and 3 have their origin in an Act of the General Assembly, approved February 22d, 1855, (see Session Acts 1855, p. 4,) which is as follows:

An Act in behalf of alien heirs and devisees.

SECTION 1. Alien heirs authorized to sell real estate within a limited time, which they may inherit in their State.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That it shall hereafter be lawful for every alien who, except for his alienage, would be entitled to any real estate by devise or inheritance from any person hereafter dying, capable at the time of his death of holding real estate situate in this State, to legally sell, for his own use, and convey the title thereof to any person capable of holding real estate situate within this State; *provided*, he make such sale and conveyance within three years next after the death of him from whom he shall claim such devise or inheritance.

SECTION 2. If any such alien be a minor, under the laws of this State, such sale and conveyance may be made by a guardian, who shall be a citizen of this State, and all sales and conveyances under this Act shall be according to the powers prescribed by the laws of this State.

This Act shall take effect and be in force from and after its passage; approved February 22d, 1855.

Soon after the passage of this Act, these provisions were incorporated into the Revised Statutes of 1855, (p. 186,) substantially the same as they appear in the Revision

of 1865, as first above given in full, that is to say, the provisions of the Act of Fubruary 22d, 1855, were added as sections 2 and 3 to the old alien Act, which until that time, had consisted of a single section conferring inheritable blood upon aliens residing in the United States, who have declared their intention to become citizens, and upon all aliens residing in Missouri, whether they declare their intention to become citizens or not. The law as thus amended, remained in force until March 30th, 1872, when by an Act of the General Assembly, it was provided as follows:

Act of March 30, 1872.

SECTION 1. Aliens shall be capable of acquiring, by purchase, devise or descent, real estate in this State, and of holding, devising or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States, and residents of this State.

SECTION 2. Any female born in the United States, owning real estate or any interest therein in this State, who shall marry an alien and reside in a foreign country, may, at any time, notwithstanding such marriage or residence, convey such real estate, or any interest therein, by deed, or may at any time devise the same by last will: *Provided* the same be done in either case in conformity with the general laws of this State concerning the conveyance of real estate by deed and the making of wills.

SECTION 3. Chapter one hundred and ten of title twenty-eight of the General Statutes of Missouri, being chapter five of Wagner's Missouri Statutes, and an Act entitled 'An Act to amend chapter one hundred and ten of title twenty-eight of the General Statutes concerning real property and its alienation,' approved March 13, 1867, are hereby repealed.

SECTION 4. This Act shall take effect on the fourth day of March, in the year eighteen hundred and seventy-two.

The Act of March 13th, 1867, mentioned in section 3, of the above Act of March 30th, 1872, has no reference to the case at bar.

III.

The capacity to take by descent, must exist at the time of the intestate's death, or in other words, the descent is cast at the instant of the decedent's death. "An heir is he upon whom the law casts the estate, immediately upon the death of the ancestor," 2 Blackstone's Com., p. 201. This fundamental rule was applied in the following cases, analogous to the case at bar.

People *vs.* Conklin, 2 Hill, (N. Y.,) p. 67.

A case of subsequent naturalization of a foreign kinsman.

Heeney *vs.* Trustees of Brooklyn, 33 Barbour, p. 360.

A case of subsequent naturalization.

Keenan *vs.* Keenan, 7 Rich. (S. C.,) p. 345.

A case of subsequent naturalization.

Haigh *vs.* Haigh, 9 R. I., p. 26.

A case where a statute enlarging the rights of aliens to inherit, was held not to apply to a case happening previous to its passage.

White *vs.* White, 2 Met., (Ky.,) p. 185.

A case where intestate died just previous to the enactment of the Kentucky alien law of 1852, which is similar to the Missouri law.

Yacker's heirs *vs.* Same, 4 Met., (Ky.,) p. 33.

Assumes that treaties in force at time of death govern the descent as to aliens.

Warnell *vs.* Finch, 15 Texas, p. 163.

Decides that the constitutional provision of Texas giving alien heirs a privilege to convey within a certain period, cannot have a retrospective effect as to the estate of one dying before the Constitution was adopted.

Taylor *vs.* Pettias, 52 Ala., p. 287.

A widow held not to be entitled to dower under a law passed subsequent to death of husband, although estate not yet settled

IV.

When the next of kin are disqualified from inheriting by reason of alienage, and there are more remote kindred who are not so disqualified, the estate passes to the latter.

2 Blackstone's, Com., p. 251.
Orr *vs.* Hodgson, 4 Wheaton, pp. 453, 461.
Hazelton *vs.* Kershaw, 3 Desau., (S. C.,) 106.
Jackson *vs.* Jackson, 7 Johns., (N. Y.,) 214.

And the law of Missouri governing descents provides that, "in making title by descent, it shall be no bar to a demandant that any ancestor through whom he derives his descent from the intestate, is, or has been, an alien." Section 8, Chapter 129, General Stat. Mo., p. 518.

V.

At the time of Edward Sullivan's death, the law of Missouri expressly invested resident aliens who had declared their intention to become citizens, with the right to take real estate by descent. (See Section 1, of Chapter 110, of Statutes 1865.) There being such resident alien kindred in this case, the property in question instantaneously vested in them. The privilege or interest conferred upon non-resident aliens, by the 2d and 3d Sections of Chapter 110, was never intended to interfere with or curtail the operation of the 1st section of that chapter which had been in existence since the beginning of the State. The 2d and 3d sections were intended to take effect when, and only when there were none of the class described in the 1st section. That is to say, if there are alien kindred residing in the United States, who have declared their intention to become citizens, or if there are alien kindred residing in Missouri, whether they have declared their intention or not, *they take absolutely* to

the exclusion of any nearer relations who are non-resident aliens. This is apparent from the history and spirit of the entire legislation on this subject in Missouri as given under point II. Up to the year 1855 the class described in section one could inherit, and if there were none such the land would escheat. In 1855 the State said: If there are no persons falling under this description we will waive the State's right of escheat to this extent, that we will allow non-resident aliens a three year's privilege to dispose of the land to some one capable of holding it, and to take the proceeds to their own use. It was a concession on the part of the State of its right to take the land, and not a curtailment of the rights of resident aliens under section one, which remained as before. A contrary interpretation would be at war with the uniform policy of all American States on this subject when the act of 1855 was passed, for it would have given a preference to relatives residing in a foreign country over those who had settled here and declared their intention to become citizens. Such evidently was not the spirit or intention of the law of 1855 taken in connection with the previous law to which it was added.

VI.

If the foregoing views as to the law in force at Edward Sullivan's death are correct, it disposes of the entire case, because there were at that time a number of relatives residing in the United States, who fell under the description of the first section of the law, and also one who resided in St. Louis, Missouri, and who, in fact, did recover the property in the Courts of Missouri, and thereupon became the grantors of defendants in error. But assuming now for the purpose of this argument, that the 2d and 3d sections of the law in question were intended to confer rights upon non-resident aliens, even when there are resident kindred, embraced under

section one: then what is the interest of an alien under sections 2 and 3?

It is a mere power to sell, with a right to appropriate the proceeds to his own use. Such an interest in the proceeds of a sale is not tantamount to an interest in the land itself, and the donee acquires no *estate* in the land thereby, in the legal sense.

Washburne Real Property, Vol. 2, p. 324.

VII.

If any estate vests in the alien at all under the 2d and 3d sections of the law in question, it is an estate for years, with power to sell the fee, or at most an estate upon condition subsequent, that is, subject to be defeated upon the not happening of a certain event, viz: Alienation within three years.

Blackstone's Com., Vol. 2, p. 154.
Barclay vs. Cameron, 25 Texas, 232.

VIII.

Upon either of the foregoing theories, a part of the estate was bound to vest somewhere else upon the death of Edward Sullivan: either in the resident kindred, if there were any, or in the State. The law will not allow it to remain in abeyance. (2 Fearne on Remainders, p. 20.) In the case at bar there were resident kindred capable of inheriting, and a portion of the estate vested in them.

If the statute confers a mere power, the fee-simple vested in the resident kindred at the time of Edward Sullivan's death, subject to be shifted by the execution of the power. If, upon the other hand, the statute conferred an estate upon condition subsequent on the aliens, it follows

the exclusion of any nearer relations who are non-resident aliens. This is apparent from the history and spirit of the entire legislation on this subject in Missouri as given under point II. Up to the year 1855 the class described in section one could inherit, and if there were none such the land would escheat. In 1855 the State said: If there are no persons falling under this description we will waive the State's right of escheat to this extent, that we will allow non-resident aliens a three year's privilege to dispose of the land to some one capable of holding it, and to take the proceeds to their own use. It was a concession on the part of the State of its right to take the land, and not a curtailment of the rights of resident aliens under section one, which remained as before. A contrary interpretation would be at war with the uniform policy of all American States on this subject when the act of 1855 was passed, for it would have given a preference to relatives residing in a foreign country over those who had settled here and declared their intention to become citizens. Such evidently was not the spirit or intention of the law of 1855 taken in connection with the previous law to which it was added.

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If the statute confers a mere power, the fee-simple vested in the resident kindred at the time of Edward Sullivan's death, subject to be shifted by the execution of the power. If, upon the other hand, the statute conferred an estate upon condition subsequent on the aliens, it follows

as a corollary that the resident kindred took an estate upon condition precedent, that is, an estate to go into possessory effect at the expiration of three years, on failure of the alien heirs to convey in accordance with the statute. Upon either theory some interest or estate vested in the resident kindred at the moment Edward Sullivan died.

IX.

Plaintiffs claim that this three years' interest, power or estate, if it may be so called, was enlarged by the Act of 1872, and prior to the expiration of the period limited by the law, but we submit that the State had no title and could not take the title out of those who had it. Upon the death of the ancestor, in 1866, the estate passed to his heirs who were then capable of taking, the title to his real estate went somewhere, and the Legislature could not six years later take it away.

X.

The Act of 1872, which removes the disability of aliens, is prospective in its operation. It cannot have a retroactive effect upon a descent cast six years before. Retrospective legislation is not only void upon general fundamental principles, (Potter's Dwarris on Construction of Statutes, p. 162, and American cases in note 9), but is expressly prohibited by the Constitution of Missouri of 1865, as follows:

ARTICLE 1, SECTION 28. "That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, can be passed."

As to the construction of such clauses, see

Sedgwick on Construction of Statutes, pp. 166 and 346, (2d Ed.)

Potter's Dwarris, p. 162, *et seq*.

Hope Mut. Ins. Co. vs. Flynn, 38 Mo., 483.
Routsong vs. Wolf, 35 Mo., 174.
Westervelt vs. Gregg, 12 N. Y., 202.
1 Kent's Com., 455.

There are no words in the Act of 1872 indicating a retrospective intention, on the contrary, the phraseology points to the future. A statute is never construed retrospectively by implication, even where the legislative power to deal with the subject matter does exist.

Sedgwick on Construction of Statutes, p. 161, note *a*; also p. 164, (2d Ed.)
State vs. Auditor, 41 Mo., 25.
Haigh vs. Haigh, 9 R. I., 26.
Plumb vs. Sawyer, 21 Conn., 351.
Smith vs. Auditor, 20 Mich., 398.

XI.

Plaintiffs will probably claim that defendants cannot trace title through Mary Murta and Annie Murta, because both were *alive* at time of Edward Sullivan's death, citing McCreery vs. Somerville, 9 Wheaton, 354, where it is held that the statute of 11 and 12, William III, does not apply to a *living* alien ancestor, and does not permit a claimant to trace title through such an ancestor. The correlative Missouri statute on this subject is as follows:

"In making title by descent, it shall be no bar to a de-
"mandant that any ancestor through whom he derives his
"descent from the intestate, is, or has been, an alien."

Genl. Stat. Mo. 1865, p. 518.

The Court will perceive that the language of the Missouri statute is materially different from the English statute. The context of the Missouri law, taken in its plain,

ordinary meaning, includes the case of a living alien ancestor; the word "is" can have no other meaning, and it cannot be rejected or ignored. It was intended to cover just such cases as this. Jackson v. Sanders 2 Leigh 109

But supposing the limited construction applied by the Court in McCreery vs. Somerville to the English statute, should be extended to the Missouri statute, it by no means improves plaintiff's status in this case.

This is an action of ejectment. Plaintiffs must recover on the strength of their own title. They cannot better their situation by attacking that of the defendants. If plaintiffs are barred from the inheritance by their confessed alienage so long as there may be persons capable of inheriting the estate, it matters little for the purpose of this case, whether defendants' grantors were or were not of that class.

Plaintiffs' position seems to be as follows: First, they ask the Court to find that the defendants in this case could not inherit; then they ask the Court to presume (without any evidence), that there were no heirs in existence at the time of Edward Sullivan's death capable of taking under the 1st section of the law of 1865; then they argue that in consequence of such failure the land escheated to the State of Missouri, subject to the three years' privilege accorded to plaintiffs under the 2d section of the law of 1865; that thereupon the State, by the law of 1872, relinquished all its rights to plaintiffs. In other words, plaintiffs, if we anticipate their position correctly, virtually claim by and under a kind of inchoate right of escheat, supposed to have existed in the State of Missouri, without office found, from the time of Edward Sullivan's death up to the passage of the Act of 1872.

In the first place there is a patent non sequitur in the above chain of reasoning, for whether defendant's grantors

were lawful heirs, capable of taking or not, it does not follow that there were no lawful heirs in the United States capable of taking under the Missouri Statutes. No such presumption arises, on the contrary, the general presumption of law is that there were lawful heirs capable of taking the land of an intestate, until the contrary is shown. Nor is this presumption destroyed by simply showing the alienage of some one in the nearest line of descent. Where alienage interrupts the line of descent, the estate does not on that account escheat, but it simply turns back into a more remote line of kindred, and if another alien bars the way in that line it turns back into a still more remote line until all the collateral lines of the deceased are exhausted to the remotest degree. Then, and then only, does the land escheat.

2 Kent's Com. p. 56.
Orr vs. Hodgson, 4 Wheaton 452, 461.
Jackson vs. Clark, 7 Johnson 215.
Jackson vs. Lum, 3 Johns. Cas. 121.
Hazelton vs. Kershaw, 3 Desausure, (S. C.) 106.
2 Blackstone Com., p. 251.
Cruse Digest, vol. 3, page 367.

In ordinary cases of a claimant by collateral descent, the plaintiff must show affirmatively that all nearer lines than his own are extinct. (Adams on Ejectment, p. 282.) In the case at bar, the burden of proof is enlarged, owing to the Statute of Missouri, which gives a certain class of remote kindred in the United States a preference over nearer kindred, who are non-resident aliens, so that in such case a claimant can only recover upon showing *two* things, viz: First, that there are no *nearer* kindred, and secondly that there are no more *remote kindred capable* of taking under the Missouri alien law of 1865.

The very first element of an escheat is wanting in the

case at bar, because there is absolutely no proof that Edward Sullivan died without heirs capable of taking. In proceedings for an escheat, the State must produce evidence to show that there is a failure of heirs capable of taking. It is not sufficient to show that A, B and C are incompetent to take the estate.

(See hypothetical table of consanguinity attached.)

Some negative proof must be adduced to show that the intestate left no heirs. No presumptions are indulged in in favor of escheats.

Hammond vs. Inloes, 4 Maryland, 138, 174.
State vs. Teulon, 41 Texas, 249.
Emerson vs. White, 29 N. H., 482
State vs. Killian, 51 Missouri, 81.
2 Greenleaf Ev., §354.
People vs. Fulton Ins. Co., 25 Wend., 218.
Jackson vs. Etz, 5 Cowen, 314.

In support of the foregoing, we also direct the attention of the Court to the Missouri Statute concerning escheats. (Genl. Stat. 1865, p. 532), we cite the following sections:

SECTION 1. If any person die seized of any real or personal estate, without any devise thereof, and leaving no heirs or representatives capable of inheriting the same, or the devisees be incapable of holding the same, and where there is no owner of real estate capable of holding the same, such estate shall escheat and vest in the State.

SECTION 10. When the Attorney General or Circuit Attorney shall be informed, or have reason to believe that any real estate within his district hath escheated to the State, and such estate shall not have been sold according to law, within five years after the death of the person last seized, for the payment of the debts of the deceased, he shall file an information in behalf of the State, in the Circuit Court of the county in which

such estate is situated, setting forth a description of the estate, the name of the person last lawfully seized, the names of the terre tenants and persons claiming such estate, if known, and the facts and circumstances in consequence of which such estate is claimed to have escheated, and alleging that, by reason thereof, the State of Missouri hath a right to such estate.

SECTION 16. If, after the issues are tried, it appears from the facts found or admitted, that the State hath good title to the lands and tenements in the information mentioned, or any part thereof, judgment shall be rendered that the State be seized thereof, and recover costs against the defendant.

SECTION 18. When any judgment shall be rendered that the State be seized of any real estate, such judgment shall contain a description of such estate, and shall vest the title in the State.

The intervening and remaining sections of the statute fill out the details of the proceeding. Enough is set out in full above, to show that ere the title to real estate in Missouri can be said to vest in the State by escheat, the statutory proceeding must have been followed, and that in such proceeding the burden is upon the State to show that the person who died seized, left "no heirs or representatives capable of inheriting." So at common law there must be "office found" before the land can be properly considered as belonging to the State.

3 Washburne Real Property, p. 444.

The history of the case at bar is the most forcible argument we can advance to demonstrate that the above theory, as to the burden of proof and the necessity of requiring some negative proof as to the non-existence of heirs, is not an empty theory, but an indispensable requirement in a case of this kind. Its neglect has already cost defendants much injury and loss. Edward Sullivan died in 1866. In 1869, three years later, came a line of collateral kindred residing

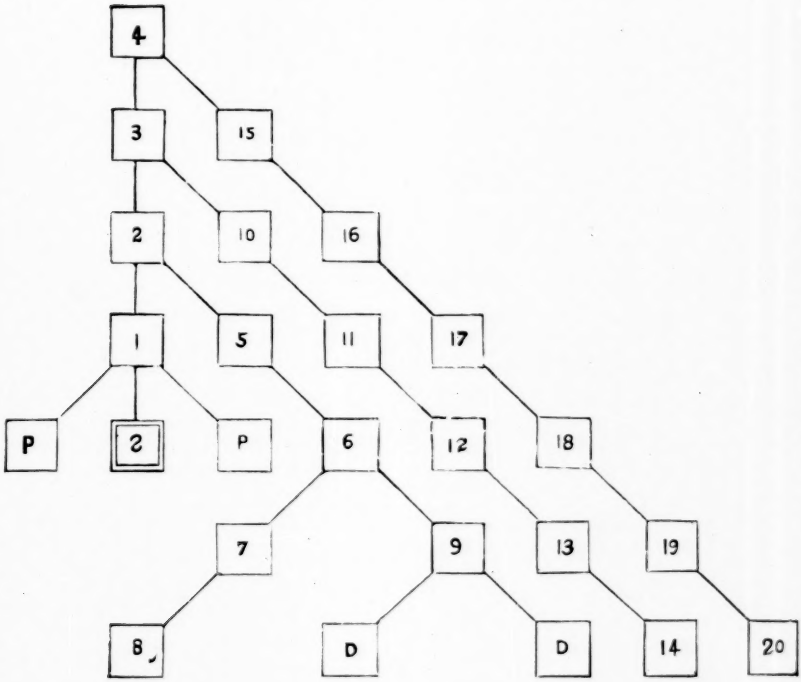
in Pennsylvania and Missouri, and claimed the estate, and it was awarded to them; in 1873, four years later, came another line of collaterals residing in Iowa, Indiana and New York, and claimed one-half the estate, and it was awarded to them; in 1878, five years later, came the present claimants residing in Ireland. (See genealogical table attached.) Who will say that after this case is disposed of, some other relations of this prolific and wide spread family will not turn up somewhere in the United States, and establish their claim under the first section of the Missouri alien law of 1865? The existence of other relatives in the United States should be negatived before the present claimants can be allowed to recover land, (already twice paid for,) on the theory that it escheated, and that the State abandoned it to them.

In conclusion we call attention to the fact that a number of questions of fact, as well as of law, submitted by defendants, were not passed on by the Court below, and were expressly reserved, because under its view of the alien laws of Missouri, plaintiffs could not recover at all, and hence their determination became immaterial for the time being. (See special finding.) This case is one of a number involving the same question, and relating to various lots of ground in the city of St. Louis, upon which valuable improvements have been made. In regard to the latter, defendants have an equity under the laws of Missouri, (Genl. Stat. Mo. 1865, p. 609), which, under the special finding of the Court, plaintiffs had no occasion or opportunity of invoking.

FINKELNBURG & RASSIEUR,
With whom is E. C. KEHR,

For Defendants in Error.

HYPOTHETICAL TABLE OF CONSANGUINITY.



Suppose S to represent the intestate, P P the plaintiffs, and D D the defendants in ejectment. Though plaintiffs show No. 9 was alive at time of intestate's death, non constat that Nos. 8, 14 and 20 were not residents of the United States, capable of taking under sect. 1 of the Missouri alien law of 1865, and that all their ancestors were dead at intestate's death. The burden is on plaintiffs to show that there was no one in existence capable of taking.

Joseph Kennan and Annie Kennan,
Common Ancestors.

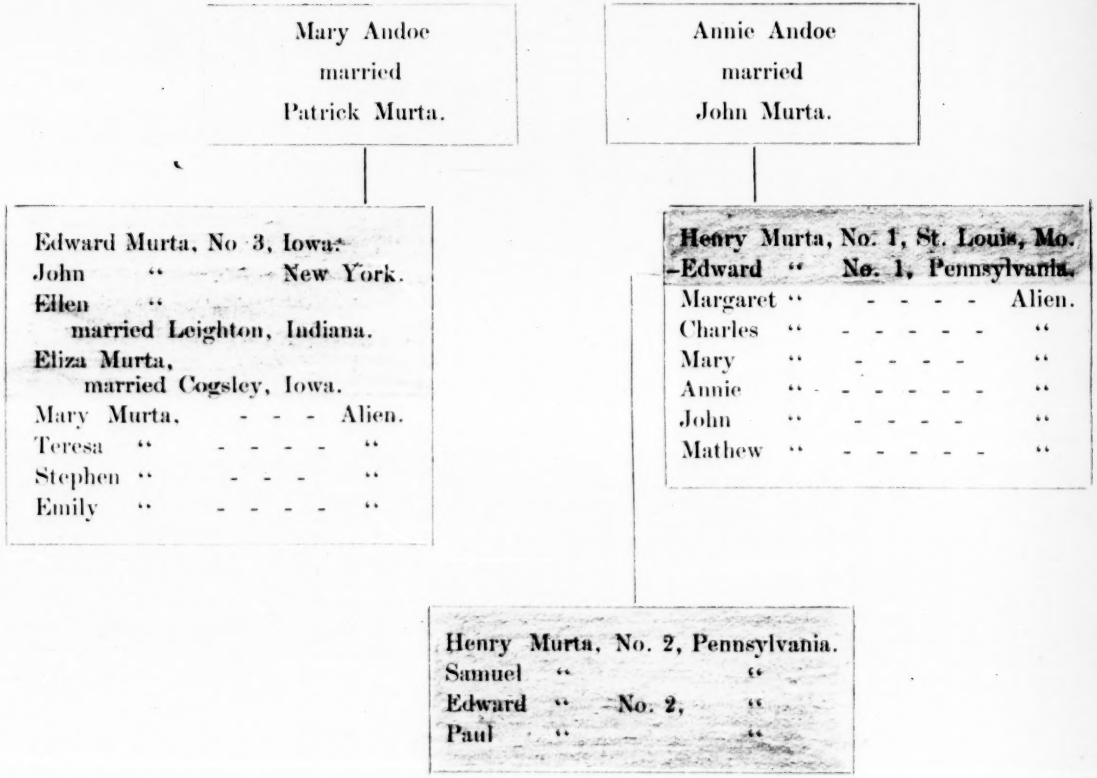
Margaret Kennan
married
Jeremiah Sullivan.

Mary Kennan
married
Mathew Andoe.

Edward Sullivan, the intestate.
Daniel ,,
George ,,
Bartholomew ,,
Henry ,, emigrated to U. S.
Joseph ,,
Emily ,,
—John ,,

Stephen Andoe.
Mathew ,,
Joseph ,,
John ,,
Charles ,,
James ,,
—Mary ,,
Christopher ,,
Annie ,,
Thomas ,,
Margaret ,,
Patrick ,,
Francis ,,
Rosanna ,, Baltimore.
Jeremiah ,,

Jeremiah Sullivan,
Mary (married) Mowlds.



GENEALOGICAL TABLE OF COLLATERAL KINDRED OF EDWARD SULLIVAN, DECEASED.

Those who were awarded the property in the partition suit are designated in blue. Those who recovered in the ejectment suits are designated in red. The present claimants are designated in green.

SUPREME COURT U.S.
FILED
MAR 13 1882
JAMES H. McKEN[illegible]

Supreme Court of the U. S.

EMILY SULLIVAN, et. al.,
Plaintiffs in error.

vs. No. 225.

H. BURNETT, et. al.,
Defendants in error.

Supplemental Brief on behalf of Defendants in Error.

In regard to the construction of the statute of 11 and 12 William III, and the corresponding statute of Missouri, being section 8 of chapter 129, General Statutes of Missouri, 1865, p. 518, we ask leave to submit the following, in addition to the views presented in our brief heretofore filed:

The English statute operated upon the common law as it stood at the time of the statute's adoption, and hence it has been construed with reference to it. The common law of descents is based exclusively on the feudal theories of *heirship*, viz: blood, pedigree, lineage. It recognizes heirship in its technical sense only, and hence

also the doctrine *nemo est hæres viventis*, which is the basis of the decision of McCreery vs. Somerville, 9 Wheaton 354. But the situation in Missouri is essentially and radically different. The Missouri statute of descents, of which section 8 is a part, regulates descents in that State on principles of its own, radically different from common law heirship. A state has the right to dispose of an intestate's property according to rules of its own, and Missouri has done so in a manner which ignores the system of common law heirship in many of its most fundamental features, as will readily appear by reference to section 1 of the statute, as printed on p. 8 of appellant's brief.

It ignores the rule that estates can never lineally ascend, it ignores the preference of males over females, it ignores primo-geniture, it permits those of the half blood to participate; indeed it ignores the doctrine of blood and pedigree altogether, by giving the estate to husbands and wives to the exclusion of collateral kindred. In short, the State of Missouri has constructed and adopted a system of its own which gives expression to its State policy on this subject, irrespective of the common law of England.

Hence we submit that the 8th section of this statute should not be construed, like the statute of William III was, according to the strict technical rules of common law heirship, but with reference to the entire scope and spirit of the Missouri law of descents, which aims to designate certain persons who are to take the estate absolutely, and wholly independent of the common law canons of descent. In this connection it may not be unimportant to notice that the word *heir* is avoided in sec-

tion 8, and the word *demandant* substituted therefor. The object of section 8 was to relieve citizens and resident aliens of a hardship entailed upon them by the common law, and to prevent escheats when there are resident kinsmen otherwise capable of taking and holding real estate. The 8th section does not discriminate between deceased and living ancestors, the living ancestor being an alien, was just as incapable of taking the property as the deceased ancestor, both figure as conduits only, and the legislature of Missouri evidently intended to prevent the mere *medius ancestor*, whether dead or living, from blocking the line of descent and thereby debarring a person otherwise entitled to take the property. See Jackson vs. Sanders, 2 Leigh. p. 109, where the corresponding statute of Virginia is so construed.

The construction contended for by appellants would deprive section 8 of half the force and effect which the legislature of Mossouri had in view. Its language is plain and concise, it speaks of the alien ancestor in the present and past tenses, the word *is* can refer to a living ancestor only. Both the letter and spirit of the law point to the construction which we contend for. The case of McKinney vs. Saviego, 13 How. 235, is not a controlling case. The question did not arise and was not passed upon by the court. What is incidentally said upon the subject is a mere dictum.

The case of McCreery vs. Somerville upon the other hand was expressly based upon the theory that the statute of Willliam III was an act in degration of the common law and must be construed strictly on that account, (see conclusion of opinion, 9 Wheat. p. 361.)

So far as the reports show the English courts have never construed the statute in the same way, and we respectfully submit that an extension of the strict construction adopted by this court in the Somerville case, by applying it to our local statutes of similar import, would not be in harmony with the American policy on the subjects of alienage and descent.

Respectfully submitted by—

G. A. FINKELNBURG,
for Defendants in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1048.

THE CITY OF OTTAWA, PLAINTIFF IN ERROR.

vs.

THE FIRST NATIONAL BANK OF PORTSMOUTH, NEW HAMPSHIRE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 14, 1881.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Bond for costs and præcipe attached	2	1
Summons	3	1
Alias summons	4	2
Declaration	5	2
Plea	10	4
Leave to file additional pleas	12	5
Pleas (additional)	13	6
Special demurrer	57	24
Stipulation as to pleas and waiver of jury	58	24
Hearing of cause	60	25
Further hearing	61	26
Cause taken under advisement	62	26
Judgment	62	26
Certificate of findings	64	27
Certificate to transcript	89	37
Writ of error	90	37
Assignment of errors	91	38
Citation	92	38

1 Pleas in the circuit court of the United States of America, within and for the northern district of Illinois, begun and held at the United court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, circuit judge of the United States for the seventh judicial circuit, and the Hon. Henry W. Blodgett, district judge of the United States for the northern district of Illinois, on Friday, the fifteenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the one hundred and sixth year.

WILLIAM H. BRADLEY, *Clerk.*

THE FIRST NATIONAL BANK OF PORTSMOUTH, New Hampshire,
vs.
THE CITY OF OTTAWA. } Debt.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the thirtieth day of August, A. D. 1879, came the First National Bank of Portsmouth, New Hampshire, plaintiff, by G. S. Eldredge, esq., its attorney, and filed in the office of
2 the clerk of the circuit court of the United States for the northern district of Illinois aforesaid, at Chicago, in said district, its bond for costs with a præcipe thereto attached, praying the issue of a writ of summons against the City of Chicago, defendant, which said bond and præcipe are in the words and figures following, to wit:

Bond for costs and præcipe.

Circuit court of the United States, northern district of Illinois. To October term, A. D. 1879.

THE FIRST NATIONAL BANK OF PORTSMOUTH, New Hampshire,
vs.
THE CITY OF OTTAWA.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 27th day of August, A. D. 1879.

G. S. ELDREDGE.

WM. H. BRADLEY, Esq., *Clerk, &c.:*

3 Please file the foregoing bond for costs in the above case, and issue summons returnable as above.

Debt, $1,000.00; damages, $1,000.00.

G. S. ELDREDGE,
Pl'ff's Att'y.

(Endorsed:) Filed Aug. 30, 1879. W. H. Bradley, cl'k.

On the same day, to wit, the thirtieth day of August, A. D. 1879, a writ of summons issued out of said clerk's office against said defendant

in said entitled cause, which said writ was returned into said clerk's office without service.

Afterwards, to wit, on the thirteenth day of November, A. D. 1879, an alias writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said alias writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

Alias summons.

Circuit court of the United States of America, northern district of Illinois, ss.

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you again to summon the City of Ottawa, if
4 found in your district, to be and appear before our judges of our circuit of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December next, to answer unto the First National Bank of Portsmouth, New Hampshire, upon an action of debt for four thousand dollars, and for the detention of said debt to its damage, as it is alleged, of one thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 13th day of November, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the 104th year.

[SEAL.] W. H. BRADLEY, *Clerk.*

I served the within writ upon the City of Ottawa, therein named, by delivering a true copy thereof to S. Richolson, mayor of said city, on the 25th day of November, A. D. 1879.

JESSE S. HILDRUP,
U. S. Marshal.
By L. O. GILMAN, *Deputy.*

(Endorsed:) Filed Dec. 1, A. D. 1879. W. H. Bradley, clerk.

5 Afterwards, to wit, on the same day, to wit, the first day of December, A. D. 1879, came said plaintiff, by i's attorneys, and filed in said clerk's office its declaration in said entitled cause; which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States in and for the district aforesaid, to the December term thereof, A. D. 1879.

The First National Bank of Portsmouth, New Hampshire, a corporation located and doing business at Portsmouth, in the State of New Hampshire, under and by virtue of the act of Congress in such case made and provided, plaintiff in this suit, by G. S. Eldredge, its attorney, complains of the City of Ottawa, a body corporate and politic, or-

ganized under and by virtue of the statutes of the State of Illinois, and situate in the county of La Salle and district aforesaid, defendant in this suit, in a plea of debt, for that whereas heretofore, to wit, on the 2d day of August, A. D. 1869, at Ottawa, to wit, at the district aforesaid, said defendant executed and deliv'red to one W. H. W. Cushman one hundred and twenty of its bonds or written obligations, each for the payment of five hundred dollars, bearing date on the day and year last aforesaid, with interest at the rate of ten per cent. per annum, payable annually, at the St. Nicholas National Bank, in the city of New
6 York, forty of which bonds were payable in five years from date, forty of which were payable in ten years from date, and forty of which were payable in fifteen years from date, and numbered respectively from one to one hundred and twenty inclusive, and each of which was signed by Henry A. Schuler, the then mayor of said city, and R. N. Waterman, the then clerk of said city, and attested by the corporate seal of said city; and the plaintiff avers that afterwards, to wit, on the 1st day of September, A. D. 1869, at Boston, in the State of Massachusetts, to wit, at the district aforesaid, the said plaintiff, for a valuable consideration, became the purchaser of eight of said bonds, viz, bonds Nos. 41, 42, 44, 46, 49, 50, 52, 53, each of which eight said last-mentioned bonds became due and payable by the terms thereof on the 2nd day of August, A. D. 1879, a copy of one of which said bonds, viz, bond No. 41, is hereto annexed, and made a part of this declaration, and marked Exhibit A.

And the plaintiff avers that the remainder of said eight bonds are severally in all respects like said bond No. 41, set forth in said Exhibit A, except that they were numbered respectively as hereinbefore stated.

And the plaintiff further avers that there were annexed to each of said last-mentioned eight bonds, ten interest coupons, for the payment of the annual interest thereon; two of which coupons are still
7 due and unpaid, viz, the coupons for the interest payable August 2d, 1878, and the interest payable August 2d, 1879, and of which the plaintiff so became and still is the lawful owner and holder, a copy of one of which said interest coupons is hereto annexed, and made a part of this declaration, and marked Exhibit B.

And the said plaintiff avers that the remainder of said coupons so annexed to said last-mentioned eight bonds, so now held by said plaintiff, being sixteen in number, are severally in all respects like the said coupon set forth in said Exhibit B, except with respect to the number and time for payment thereof, and which said coupons were also respectively signed by the said Henry A. Schuler, the then mayor of said city, and said R. N. Waterman, the then clerk of said city.

And said plaintiff avers that it still is the lawful owner and holder of said eight bonds and said coupons annexed thereto, and that by means of the promises the said defendant became liable to pay to the said plaintiff the said several sums of money in *in* said bonds and coupons last mentioned respectively stated, according to the tenor and effect thereof, and being so liable, said defendant afterwards, to wit, on the 2d day of August, 1879, agreed to pay the same to the said plaintiff, when it should be thereunto afterwards requested, yet the
8 said defendant, although often requested, hath not paid the same, nor any part thereof, to the said plaintiff, whereby an action hath accrued to the said plaintiff to have and recover of and from the said defendant the sum of four thousand dollars debt, and the

further sum of, to wit, one thousand dollars damages; wherefore it brings suit, &c.

G. S. ELDRIDGE,
Pl'ff's Att'y.

EXHIBIT A.

No. 41.] THE UNITED STATES OF AMERICA. [$500.

STATE OF ILLINOIS, CITY OF OTTAWA.

City of Ottawa, ten per cent. bond.

The City of Ottawa acknowledges itself indebted and promises to pay to W. H. W. Cushman, or to the bearer hereof, the sum of five hundred dollars, lawful money of the United States of America, at the St. Nicholas National Bank of the city of New York, ten years from date, with interest at the rate of ten per cent. per annum until paid, payable annually at said bank on presentation of the several coupons hereto annexed, as they shall severally become due, and to the payment of the principal and of the several coupons hereto annexed, and of the interest as aforesaid, after maturity, the faith of the city is hereby irrevocably pledged.

9 This is one of one hundred and twenty bonds of like amount, and even date herewith, numbered one to one hundred and twenty respectively, issued by the City of Ottawa, by virtue of the charter of said city, wherein it is provided that "The city council shall have power to borrow money on the credit of the city, and to issue bonds therefor and pledge the revenue of the city for the payment thereof, provided that no sum or sums of money shall be borrowed at a greater interest than ten per cent. per annum." ART. V, SEC. 3. "No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city, attending an election for that purpose." ART. X, SEC. 20.

And, also, in accordance with a certain ordinance passed by the city council of said city, on the 15th day of June, A. D. 1869, entitled "An ordinance to provide for a loan for municipal purposes."

Which ordinance was ratified by a majority of all the qualified

[25 cts. rev. st.]

of said city at an election holden on the 20th day of July, A. D. 1869, and in conformity with an ordinance passed by the city council of said city on the 30th day of July, 1869, entitled "An ordinance to carry into effect the ordinance of June 15th, 1869, entitled 'An ordinance to provide for a loan for municipal purposes.'"

10 Witness the signatures of the mayor and clerk of said city and the corporate seal thereof, this 2d day of August, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.] HENRY A. SCHULER, *Mayor.*
R. N. WATERMAN, *Clerk.*

EXHIBIT B.

No. 41.] *City of Ottawa interest warrant.* [$50.

The City of Ottawa promises to pay bearer, 2d August, A. D. 1878, fifty dollars, at the St. Nicholas National Bank, New York City, being one year's interest on bond numbered as above.

HENRY A. SCHULER, *Mayor.*
R. N. WATERMAN, *Clerk.*

(Endorsed:) Filed Dec. 1, 1879. W. H. Bradley, cl'k.

Afterwards, to wit, on the second day of January, A. D. 1880, came said defendant, by its attorneys, and filed in said clerk's office its plea in said entitled cause. Which said plea is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

11 In the circuit court of the United States in and for the district aforesaid, and December term thereof, A. D. 1879.

THE FIRST NATIONAL BANK OF PORTSMOUTH, New Hampshire,
vs.
THE CITY OF OTTAWA, IN THE COUNTY OF La Salle & State of Illinois. } Action of debt.

And the said defendant, by Samuel Richolson and M. T. Maloney, its attorneys, comes and defends the wrong and injury, when, &c., and says it does not owe the said sum of money above demanded by said plaintiff, or any part thereof, in manner and form as the said plaintiff hath thereof complained against it. And of this the said defendant puts itself upon the country, &c.

SAMUEL RICHOLSON AND
M. T. MALONEY, *Def't's Att'ys.*

(Endorsed:) Filed Jan'y 2, 1880. W. H. Bradley, cl'k.

Afterwards, to wit, on the eleventh day of March, in the adjourned

March term, A. D. 1880, of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, appears the following entry, to wit:

12 THE FIRST NATIONAL BANK OF PORTSMOUTH, N. H.
vs.
THE CITY OF OTTAWA. } Debt.

Now come the parties, by their attorneys, and by agreement, it is ordered that the defendant have leave to file additional pleas herein by the twentieth instant, and that this cause be submitted to the court for trial and a jury waived.

Afterwards, to wit, on the twenty-second day of March, A. D. 1880, came said defendant, by its attorneys, Samuel Richolson and M. T. Moloney, and Messrs. Lawrence, Campbell & Lawrence, and filed in said clerk's office its additional pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

13 *Additional pleas.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States, in and for the district aforesaid, March term, A. D. 1880.

THE FIRST NATIONAL BANK OF PORTSMOUTH
vs.
THE CITY OF OTTAWA. } Action of debt.

And the said defendant, by Samuel Richolson, M. T. Moloney, and George C. Campbell, its attorneys, comes and defends the wrong and injury, when, &c., and says that the said supposed bonds and coupons mentioned and described in the plaintiff's declaration herein as bonds of the City of Ottawa, bearing date on the second day of August, A. D. 1869, and numbered 41, 42, 44, 46, 49, 50, 52, and 53, and the coupons attached thereto are not deeds, bonds, or writings obligatory of the said City of Ottawa, defendant, and were not executed and delivered by said City of Ottawa.

And of this the defendant puts itself upon the country.

By SAMUEL RICHOLSON,
14 & GEO. C. CAMPBELL,
M. T. MOLONEY, *Its Attorneys.*

STATE OF ILLINOIS,
La Salle County, ss:

Maurice T. Moloney, being duly sworn, on his oath states that he is an officer of the City of Ottawa, that is to say, the city attorney of the said City of Ottawa, duly elected and qualified as such officer.

Affiant further states upon his said oath that he verily believes that the facts set forth in the above and foregoing plea are true in substance and in fact.

M. T. MOLONEY.

Subscribed and sworn to before me this 19th day of March, A. D. 1880.
[SEAL.] D. B. SNOW,
Notary Public.

15 UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court of the United States in and for the district aforesaid, and December term thereof, A. D. 1879.

THE FIRST NATIONAL BANK OF PORTSMOUTH
vs.
THE CITY OF OTTAWA. } Action of debt.

1. And for a further plea in this behalf the sa*ys* defendant says, actio

non, because it says that the said bonds and coupons in said declaration described were sold and delivered to the plaintiff long after the same, by the terms, respectively, were due and payable, to wit, on the first day of September, A. D. 1879.

And the defendant further avers that the said bonds and coupons in said declaration mentioned and described, were executed by the said mayor and city clerk of said defendant municipality, and delivered in the manner set forth and described in plaintiff's declaration, by virtue of the supposed power and authority given by a certain ordinance of the City of Ottawa, passed by the city council of said City of Ottawa on the 15th day of June, A. D. 1869, and referred to by its title in the body of each of said bonds, entitled "An ordinance to provide for a loan for municipal purposes," and was in the words and figures following, to wit:

Be it ordained by the city council of the City of Ottawa:

16 SECTION I. That the mayor of the city be, and he is hereby, authorized to borrow in the name of the city, at a rate of interest not exceeding ten per cent., the sum of $60,000 for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued therefor in sums of five hundred dollars, with interest payable annually, said bonds to be payable one-third in five years, one-third in ten years, and one-third in fifteen years after the date thereof.

Provided, That no application shall be made of the proceeds of said bonds except for the purpose aforesaid, and in pursuance of an ordinance to be duly passed for that purpose by the city council, nor until the faithful application of the proceeds of such bonds to the purposes aforesaid shall be faithfully secured by the city.

SECTION II. Be it also ordained that a sufficient sum to pay the interest on said loan shall be annually provided by taxation and set apart as a separate fund, and to be applied to the payment of the interest on said bonds and for no other purposes.

SECTION III. This ordinance shall be submitted to the votes of the city, to be voted for or against, at an election to be held for that purpose on the 20th day of July, 1869; and the manner of the determination shall be by depositing ballots, upon which shall be written or

17 printed "For the loan ordinance," or "Against the loan ordinance."

And also an ordinance passed by the city council of the City of Ottawa, on the 30th day of July, A. D. 1869, entitled "An ordinance to carry into effect the ordinance of June 15th, 1869, entitled 'An ordinance to provide for a loan for municipal purposes,'" which was in the words and figures following, to wit:

Whereas by an ordinance passed by the city council on the 15th day of June, 1869, it was provided that the mayor of the city should be authorized to borrow in the name of the city sixty thousand dollars, to be expended in developing the natural advantages of the city for manufacturing purposes, and to issue the bonds of the city therefor; and

Whereas it was provided by said ordinance that the same should be submitted to the votes of the city, to be voted for or against at an election to be holden for that purpose on the 20th day of July, 1869, and whereas at said election the said ordinance was ratified by the voters of the city by a majority of 823 votes, being a majority of the legal voters of the city:

Now, therefore, be it ordained by the city council of the City of Ottawa that the bonds of the city for the sum of sixty thousand dollars be issued by the mayor in accordance with the terms and conditions of said ordinance of June 15, 1869, and that he deliver the same to Wm. H. W. Cushman, to be used by him in developing the natural resources of the surroundings of the city, and that the said Cushman
18 is authorized and directed to expend the same in the improvement of the water-power upon the Illinois and Fox rivers within the city and in the immediate vicinity thereof under the franchises which have been granted for that purpose by the legislature of the State, or which may hereafter be granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water-power in the city and its immediate vicinity; provided that said Cushman shall execute and deliver to the mayor an agreement from him to the City of Ottawa that he will, without unreasonable or unnecessary delay, cause a good, substantial, and sufficient dam to be constructed across the Illinois River above the city, to bring into use all the available water-power of said river at Ottawa, and will construct sufficient head and tail race to make such water-power available; said races to be constructed and continued to the Fox River below the aqueduct and above the island in Fox River, as fast as the same may be required for actual use and as fast as said water-power can be leased at fair and reasonable rates and be brought into actual operation, and that he will also erect a good, substantial, and sufficient dam across Fox River, to make available the water-power of both rivers at Ottawa, as soon as the additional water-power created by such dam across Fox River can be brought into actual use by being leased at reasonable and fair rates, so as to have all the available water-
19 power of both rivers at Ottawa ready for use as rapidly as called for; and provided also, that said Cushman shall bind himself that if said work is not constructed as aforesaid that he will return said bonds to the city, or the value of the same, and save it harmless from all loss on account of the same, or on account of interest accruing thereon; and in case said work shall not be completed by said Cushman, then to return a pro rata share of said bonds in the proportion that the cost of the work constructed shall bear to the part of the work not constructed; provided, that at least one of the dams above mentioned, with the races necessary to make the water-power thereby created available for practical use, shall be completed, or the whole of said bonds shall be returned to the city by said Cushman."

The intent of this ordinance being to secure the improvement and development of said water-power in the city by appropriating the loan obtained under the ordinance aforesaid for that purpose, or pro rata, as far as said water-power shall be made available for practical use.

And also the charter of said City of Ottawa, defendant, wherein it is provided (art. 5, sec. III), "the city council shall have power to require of all officers appointed in pursuance of this charter, bonds with security and penalty for the faithful performance of their respective duties as may be deemed expedient; and also to require all officers appointed as aforesaid to take an oath for the faithful per-
20 formance of the duties of their respective offices before entering upon the discharge of the same; to establish, support, and regulate common schools; to divide the city into school districts; to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenues of the city for the payment thereof; provided,

that no sum or sums of money shall be borrowed at a greater interest than at ten per cent. per annum."

"No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election held for that purpose" (article X, S. XX). And the said bonds and coupons, in plaintiff's declaration described, were executed by no other power and authority whatever.

And defendant further avers that the 18th general assembly of the State of Illinois, convened in January, A. D. 1851, passed an act, made and declared by the said general assembly to be a public act, approved February the 15th, 1856, entitled "An act to authorize certain persons to construct a dam across Fox River for hydraulic and manufacturing purposes."

1. By said act it was provided that said Wm. H. W. Cushman and other persons named in the first section thereof, and their associates and successors, were created a body-politic and corporation under the name and style of "The Ottawa Manufacturing Company," and the substantial rights, privileges, and powers granted thereby to said corporate company were set forth in the second section of said
21 act, as follows, to wit:

"§ II. The said company, when formed, are hereby authorized to build a dam across Fox River, on section eleven (11) or twelve (12), in township thirty-three (33) north, of range three (3) east, in La Salle County, for the purpose of creating a water-power, and the said company may use, lease, or otherwise dispose of the same, and may construct such other works, buildings, and machinery as may be deemed necessary or proper to use such water, and to promote the interests and objects of the company."

Further, the defendant avers that the 24th general assembly of the State of Illinois, convened January the 2nd, A. D. 1865, passed an act, approved February 16th, 1865, to amend an act entitled "An act to amend an act entitled 'An act to authorize certain persons to construct a dam across Fox River for hydraulic and manufacturing purposes,' approved Febraary 15th, 1851," which act is in the words and figures following, to wit:

SECTION I. Be it enacted by the people of the State of Illinois, represented in the general assembly, That the said company shall have, in addition to the power granted in and by the said acts to which this is an amendment, the right for all of the purposes mentioned in the said act to build a dam across the Illinois River, at such a point as the said company may elect, and also the right to construct a race or races for the purpose of introducing the water of the Illinois River into the floor of the dam authorized to be erected across Fox River, and
22 for any or all purposes contemplated by this act, and by the act to which this act is an amendment, may take and use such portion of any highway, street, alley, or public ground as may be deemed necessary.

SEC. II. Section nine (9) of the act to which this is an amendment is hereby amended by adding at the end of the same the following:

"Provided that no action or other proceeding shall be had against such company on account of the erection of said dam, race or races, unless within one year after the erection or construction of the same or any or either of them."

SEC. III. The fourth (4) section of said act to which this is an amendment shall read as follows:

"The capital stock of said company may be fixed by the same and divided into shares, and may be increased or diminished."

SEC. IV. The name of "Henry G. Colton" in the first section of said original act is stricken out, and the names of "Dwight Cameron" and "John F. Nash" are hereby inserted in its stead.

Approved February 16, 1865.

And defendant further avers that the said act so incorporating the said Ottawa Manufacturing Company, and the said act amendatory thereto, were the same franchises and powers referred to in the said ordinance passed July 30th, 1869, as having been granted for that purpose by the legislature of the State of Illinois, and under which said Wm. H. W. Cushman was authorized and directed to ex-
23 pend the proceeds of the said one hundred and twenty bonds, of which the said bonds and the coupons attached thereto, mentioned and described in plaintiff's declaration, are a part.

Defendant further avers that the said Ottawa Manufacturing Company was then and there, and now is, a private corporation, organized for private business ends only, and was in no way connected with or controlled by the said defendant and was at no time connected with or controlled by the municipal organization or government of defendant; and that the said bonds and coupons described in plaintiff's declaration were issued to the said Ottawa Manufacturing Company and the said Wm. H. W. Cushman, and to the bearers thereof, by the city council of defendant, as a mere voluntary donation to the said Ottawa Manufacturing Company in the prosecution of a strictly private business enterprise, to wit, the business mentioned in the aforesaid ordinances passed by the city council as aforesaid on the 30th day of July, A. D. 1869, and the said bonds and coupons were not issued for any municipal purposes whatever. All of which matters hereinbefore set forth the said Cushman and the said Ottawa Manufacturing Company then and there had full actual notice; and the said plaintiff procured the said bonds and coupons in his said declaration described to be sold and delivered to him after the maturity thereof, and with full notice of all the rights and defenses above set forth.

And also the defendant says that the said action of the said city
24 council of the City of Ottawa, defendant, in issuing the said bonds and coupons, and the action of the said mayor and clerk of defendant in executing the same, was wholly without any authority of law, and the same are null and void, and this defendant will verify. Wherefore it prays judgment, &c.

2. And for a further plea in this behalf, defendant says actio non, because it says that the said bonds and coupons in plaintiff's declaration mentioned and described, were executed by the said mayor and city clerk of the said City of Ottawa under the supposed power and authority of a certain ordinance of the City of Ottawa, passed by the city council thereof on the 15th day of June, 1869, and referred to by its title in the body of each of said bonds, and which said ordinance was falsely entitled "An ordinance to provide for a loan for municipal purposes," and which falsehood is plainly apparent upon reading said ordinance, which, after the false name and title thereof, is in the words and figures following, to wit:

Be it ordained by the city council of the City of Ottawa—

SEC. 1. That the mayor of the city be, and he is hereby, authorized to borrow, in the name of the city, at a rate of interest not exceeding ten per cent., the sum $60,000 for the use of said city, to be ex-

pended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued therefor in sums of five hundred dollars, with interest payable annually said
25 bonds to be payable one-third in five years, one-third in ten years, and one-third in fifteen years after the date thereof.

Provided, that no application shall be made of the proceeds of said bonds except for the purpose aforesaid, and in pursuance of an ordinance to be duly passed for that purpose by the city council, nor until the faithful application of the proceeds of such bonds to the purpose aforesaid shall be fully secured by the city.

SEC. II. Be it also ordained, that a sufficient sum to pay the interest on said loan shall be annually provided by taxation, and set apart as a separate fund, and to be applied to the payment of the interest on said bonds, and for no other purpose.

SEC. III. This ordinance shall be submitted to the voters of the city, to be voted for or against at an election to be held for that purpose on the 20th day of July, 1869; the manner of the determination shall be by depositing ballots, upon which shall be written or printed, "For the loan ordinance," or "Against the loan ordinance."

And also under the supposed power of another ordinance of said City of Ottawa, passed by the city council thereof on the 30th day of July, A. D. 1869, which said ordinance was entitled, "An ordinance to carry into effect the ordinance of June 15th, 1869," falsely entitled "An ordinance to provide for a loan for municipal purposes," which said last ordinance is in the words and figures following, to wit:

26 "An ordinance to carry into effect the ordinance of June 15th, 1869, entitled 'An ordinance to provide for a loan for municipal purposes,' which was in the words and figures following, to wit:

"Whereas by an ordinance passed by the city council on the 15th day of June, 1869, it was provided that the mayor of the city should be authorized to borrow in the name of the city sixty thousand dollars, to be expended in developing the natural advantages of the city for manufacturing purposes, and to issue the bonds of the city therefor, and whereas it was provided by said ordinance that the same should be submitted to the voters of the city to be voted for or against, at an election to be holden for that purpose on the 20th day of July, 1869; and whereas at said election the said ordinance was ratified by the voters of the city by a majority of 823 votes, being a majority of the legal voters of the city." And the said bonds and coupons in plaintiff's declaration described, were executed by no other power or authority whatever.

And the defendant further avers that the franchises and powers referred to in the said ordinances above mentioned as having been granted for the purposes set forth in the said ordinances, are the same franchises and powers which (by an act of the 17th general assembly of the State of Illinois, entitled "An act to authorize certain persons to construct a dam across the Fox River, for hydraulic and manufact-
27 uring purposes," approved February 15th, 1851, and an act of the 24th general assembly of the State of Illinois, amendatory thereto, approved February 16th, 1862, entitled "An act to authorize certain persons to construct a dam across Fox River, for hydraulic and manufacturing purposes," approved February 15th, 1851) were conferred upon a corporation thereby created and incorporated as the Ottawa Manufacturing Company.

And defendant further avers that the said Ottawa Manufactur-

ing Company was then and there, and now is, a private corporation, organized for private business ends only, and was in no way connected with, or controlled by, the said defendant, and that the said bonds and coupons described in plaintiff's declaration were issued to the said Wm. H. W. Cushman for the use and benefit of the said Ottawa Manufacturing Company (the said Cushman being then and there the president thereof), by the said mayor and city clerk of said City of Ottawa, as a mere voluntary donation to the said Ottawa Manufacturing Company in the prosecution of a strictly private business enterprise situated outside of the city limits of defendant, to wit, the business mentioned in the aforesaid ordinance of the 30th of July, 1869, and the said bonds and coupons were not issued for any municipal purpose whatever.

And the defendant further avers that the statement in the title of said ordinance of June 15th, that the loan to be voted for or against by the legal voters of said City of Ottawa, defendant, for mu-
28 nicipal purposes, was false and untrue, and that said ordinance itself was never submitted to the voters of said city to be voted for or against with knowledge of the contents of the said ordinance, and that the only notice of said election given to said voters was by posting notices stating the time and place of such election to be or vote for or against a loan for municipal purposes, and that the said ordinance was not (except the title thereof) submitted to the legal voters of said City of Ottawa, to be voted for or against, at an election held for that purpose, by means whereof the said voters of the City of Ottawa were induced to vote for an ordinance for a loan for a private and not for a municipal purpose, under the false pretense that the intended loan was for a municipal purpose solely, all of which matters and defenses herein set forth, the said Cushman and the said Ottawa Manufacturing Company then and there had full, actual notice; and the said plaintiff procured the said bonds and coupons in the said declaration described, to be sold and delivered to him after the maturity thereof, and with full notice of the rights and defences above set forth, and as the defendant says that said ordinance was never lawfully submitted to and adopted by a vote of the legal voters of said City of Ottawa, and was null and void, and the said action of the said mayor and clerk of said city in the execution of said bonds and coupons was wholly without any au-
29 thority of law and this the defendant will verify; wherefore it prays judgment, &c.

3. And for a further plea herein, defendant says actio non, because it says that the said bonds and coupons were issued by the mayor and clerk of said City of Ottawa, to the said William H. W. Cushman (in the manner set forth in plaintiff's declaration, to wit, the 2d day of August, A. D. 1869), for the use and benefit of the Ottawa Manufacturing Company, a private corporation (organized for strictly private ends only, and in no way connected with or controlled by defendant) created by an act of the general assembly of the State of Illinois, approved February 15th, 1851, entitled "An act to authorize certain persons to construct a dam across the Fox River, for hydraulic and manufacturing purposes," and an act of the 24th general assembly of the State of Illinois, amendatory to the above act, approved February 16th, 1865, entitled "An act to authorize certain persons to construct a dam across Fox River, for hydraulic and manufacturing purposes," approved February 15th, 1851; the first above-named act creating the powers, purposes and franchises of the Ottawa Manufacturing Company, was declared and enacted by the said general assembly to be a public

act, and the said bonds and coupons were issued by the city council of defendant municipality to the said William H. W. Cushman, for the use and benefit of the Ottawa Manufacturing Company, in its said private capacity as a mere donation to aid the said Ottawa Manufact-
30 uring Company in the prosecution of a strictly private business enterprise, and not for any municipal purpose whatever.

And defendant now here avers that the city council of the City of Ottawa, at or prior to the time the said bonds and coupons were issued did not pass any ordinance providing for borrowing any sum or sums of money whatever, nor to issue bonds of the said City of Ottawa, to be delivered to said William H. W. Cushman or any other person or persons whomsoever, to be issued or expended in aid of the said Ottawa Manufacturing Company as aforesaid, in any manner whatever in the prosecution of its business under the powers and franchises granted by the acts of the general assembly aforesaid incorporating the same.

And further avers that the said city council at or prior to the time the said bonds and coupons described in plaintiff's declaration were issued as therein alleged, or at any time did not submit any ordinance to the voters of the said City of Ottawa to be voted for or against, by the voters of said City of Ottawa, attending any election held for that purpose, nor was any election ever held in said City of Ottawa for the purpose of submitting to the voters thereof any ordinance providing for borrowing any money in the sum of sixty thousand dollars or any sum or sums whatever, and to issue bonds of defendant therefor, to be delivered to said Cushman and to be used to aid the said Ottawa Manufact-
31 uring Company in prosecuting the powers and franchises granted it by the said acts of the said general assembly of the State of Illinois, nor was any ordinance or proposition whatever (to borrow the sum of sixty thousand dollars or any other sum whatever, and to issue said one hundred and twenty bonds in plaintiff's declaration described therefor, to the said Ottawa Manufacturing Company or the said William H. W. Cushman, or any other person or persons whatsoever), to aid the said Ottawa Manufacturing Company in prosecuting its business under the powers and franchises aforesaid, submitted to the voters of said city or voted for by a majority of the voters of said City of Ottawa attending any election held for that purpose.

And so defendant says that the issuing of said bonds in plaintiff's declaration described by the city council of Ottawa, aforesaid, was wholly unauthorized and in violation of the provisions of the charter of the said City of Ottawa in that behalf, all of which said plaintiff had notice when he purchased said bonds and coupons as alleged in said declaration, and this defendant is ready to verify; wherefore it prays judgment, &c.

4. And for a further plea in this behalf defendant says actio non, because it says, as it has already in said first plea said, that the said bonds and coupons mentioned and described in plaintiff's declaration were executed by the mayor and city clerk of the said City of
32 Ottawa, and delivered to the said William H. W. Cushman, as set forth in said declaration, on the second day of August, A. D. 1869, for the use and benefit of the Ottawa Manufacturing Company, a private corporation (organized for strictly private ends, only and in no way connected with or controlled by the defendant) created by an act of the seventeenth general assembly of the State of Illinois, approved February the 15th, A. D. 1851, entitled, "An act to authorize certain persons to construct a dam across Fox River for hydraulic and manu-

facturing purposes," and also an act of the twentyfourth general assembly of the State of Illinois, amendatory to the above act, approved February the 16th, A. D. 1865, entitled "An act to authorize certain persons to construct a dam across the Fox River for hydraulic and manufacturing purposes," approved February 15th, A. D. 1851 (the first above-named act creating the powers, purposes, and franchises of the Ottawa Manufacturing Company was declared and enacted by the said general assembly to be a public act), and the said bonds and coupons were executed and delivered by the said mayor and city clerk of the defendant municipality to the said Ottawa Manufacturing Company in the said private capacity, as a mere donation to aid the said Ottawa Manufacturing Company in the prosecution of a strictly private business enterprise and not for any municipal purpose whatever.

And the defendant now here avers that at and prior to the time of the execution and delivery, by the said mayor and city clerk, of
33 the said bonds and coupons, to wit, on the second day of August, A. D. 1869, no ordinance of the said City of Ottawa had ever been passed or enacted by the city council thereof providing for the borrowing of any money or providing for the issuance of any bonds of the City of Ottawa therefor.

And the defendant further avers that at and prior to the time of the issuance of the said bonds and coupons no ordinance, passed or adopted by the city council of the said City of Ottawa for the purposes aforesaid, had ever been submitted to and voted upon by the voters of said City of Ottawa, at any election held for that purpose, and no such election had ever been called by the city council of the said City of Ottawa, nor held in said city, and no ordinance passed or adopted by the city council of the said City of Ottawa, for the purposes aforesaid, had ever been voted for by a majority of the voters of said City of Ottawa, or by any voters whatever, attending any election held for that purpose.

And the defendant further avers that at and prior to the time of the execution of the said bonds and coupons by the then mayor and city clerk of the said City of Ottawa, to wit, on the second day of August, A. D. 1869, no ordinance had ever been passed or adopted by the city council of the said City of Ottawa, authorizing the said mayor and city clerk to issue any bonds of the said City of Ottawa to the said William H. W. Cushman, or to any other person or persons whomsoever,
34 and so the defendant says that the said bonds and coupons, in plaintiff's declaration mentioned, were executed and delivered to said William H. W. Cushman and the bearers thereof, without any authority whatever from the city council of the City of Ottawa, or a majority thereof, obtained and expressed in the manner provided by the charter of said City of Ottawa, all of which said plaintiff had full notice of at the time he purchased said bonds and coupons in plaintiff's declaration menioned, all of which the defendant will verify; wherefore it prays judgment, &c.

5. And for a further plea in this behalf the defendant says actio non, because it says that the said bonds and coupons, in the said declaration mentioned and described, were executed and delivered by the said mayor and city clerk of said defendant, and delivered in the manner set forth and described in said plaintiff's declaration, by virtue only of the supposed power and authority given to the said city council of the said City of Ottawa, by the charter of the said City of Ottawa, wherein it is provided (article V, § 1): "The city council shall have power and authority to levy and collect taxes upon all property, real and per-

sonal, within the limits of the city, not exceeding one-half of one per cent. per annum upon the assessed value thereof, and may enforce payment of the same in any manner to be prescribed by ordinance, not repugnant to the Constitution of the United States and of this State." (Article V, § III.): "The city council shall have power to require of all officers appointed in pursuance of this charter, bonds with penalty and security for the faithful performance of their respective duties, as may be deemed expedient; and also to require all officers appointed as aforesaid to take an oath for the faithful performance of the duties of their respective offices before entering upon the discharge of the same; to establish, support, and regulate common schools; to divide the city into school districts; to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof; provided that no sum or sums of money shall be borrowed at a greater interest than at ten per cent. per annum." (Article X, section XX): "No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election held for that purpose," and also by virtue of the supposed power and authority given by an act of the 25th general assembly of the State of Illinois, entitled "An act to authorize the City of Ottawa to subscribe to the stock of the Ottawa Manufacturing Company, approved February 19th, A. D. 1867," which act provides substantially as follows:

"That William Reddie, Milton H. Swift, Jeremiah Wood, George Avery, and Richard Thorne, be, and they are hereby, constituted a board of commissioners for and on behalf of said city, to subscribe to the capital stock of the Ottawa Manufacturing Company the sum of one hundred thousand dollars, and when fully paid to receive and hold the stock of said company for the same, and the proceeds thereof, for and on behalf of said city, and by no other authority whatever.

"§ II. In order to raise the money to enable said commissioners to make such subscription, they are hereby authorized, for and on behalf of said city, to make, execute, and dispose of bonds of the same to the amount of one hundred thousand dollars, at a rate of interest not exceeding ten per centum per annum, payable in not less than ten years, irrevocably pledging the faith and resources of said city for the ultimate redemption of the same, and the payment of the interest thereon. Such bonds shall not be disposed of by said commissioners for less than their par value.

"§ III. The city council of said city is hereby authorized and required annually, after being notified by said commissioners of the issuance of such bonds, to levy and collect as other taxes are levied and collected, and at the same time, and in the same manner, not less than six mills on each dollar of the assessed value of the real and personal property in said city. The proceeds of such tax shall be paid over by the collector of said city to the treasurer thereof, and by him kept as a separate fund, subject to the order of said commissioners, for the payment of the interest on said bonds, and in case of a surplus the said commissioners shall invest the same in the bonds of the United States or of the State of Illinois, for the ultimate redemption of such bonds.

"§ IV. The said commissioners may appoint and a secretary who shall be treasurer. The latter shall give bonds to said city, conditioned for the faithful discharge of his duties, and they

may appoint a proxy to vote on said stock at any meeting of the stockholders of said company, and instruct such proxy in what way to vote, but no vote shall be given on said stock for either of such commissioners for directors of said company.

"§ V. Said commissioners may at any time dispose of such stock at not less than its par value, and any holder of any such bonds may at any time exchange the same for an equal amount of said stock. In case of a sale of such stock, or of any portion of the same, the said commissioners shall, if practicable, take up said bonds, and if not, shall invest the proceeds in bonds of the United States or of the State of Illinois. Said commissioners shall keep a record of their proceedings, and annually report to the city council their doings herein. Said commissioners shall be allowed all reasonable expenses, but no compensation for their services.

"In case of a vacancy in said board by death, resignation, refusal, or neglect to act, or removal from the county of La Salle, the circuit court of said county shall fill such vacancy."

38 And the defendant avers that the aggregate value of all the property, real and personal, within the limits of the said City of Ottawa, as fixed and ascertained by the assessment thereof and the return of the said board of equilization of the State of Illinois for and during the year A. D. 1869, was the sum of two millions of dollars, and that since the year A. D. 1869, the value of all the property, real and personal, within the said City of Ottawa, ascertained as aforesaid, has at no time exceeded the sum of two millions and two hundred thousand dollars, and that the actual necessary current expenses of defendant for each year since the year 1869 has been the sum of, to wit, twenty thousand dollars, and that the said tax of one-half of one per cent. of said valuation of the taxable property of said city, together with all the revenues derived by said City of Ottawa from licenses and all other sources have not been more than sufficient to meet the yearly actual necessary current expenses of said city each year.

And the defendant further avers that at and prior to the time of the execution and delivery of the said bonds and coupons by the said mayor and city clerk of said City of Ottawa no ordinance had ever been adopted by the city council of the City of Ottawa authorizing the issuance of said bonds and coupons to the said William H. W. Cushman, or any other person or persons whomsoever, and no such ordinances passed for the purpose aforesaid had ever been submitted

39 to the voters of said city at any election held for that purpose, and no such ordinance had ever been voted for by a majority of the voters of said City of Ottawa attending any election held for that purpose, nor voted for by any voters of said city whatever, and no election for the purposes aforesaid had ever been held at or within the said City of Ottawa, and no ordinance authorizing the said mayor and city clerk to execute and issue said bonds and coupons in plaintiff's declaration mentioned had ever been passed or adopted.

And the defendant further avers that neither at nor prior to the time of the issuance of said bonds and coupons in plaintiff's declaration mentioned the said William Reddick, Milton H. Swift, Jeremiah Wood, George Avery, and Richard Thorn, for and on behalf of the said city of Ottawa, ever subscribed to the capital stock of the said Ottawa Manufacturing Company the sum of one hundred thousand dollars, nor any other sum whatever, nor had they received any stock of the said company for and on behalf of the said City of Ottawa, nor had the above-named persons, as commissioners of said City of Ottawa, issued any

bonds or incurred any indebtedness for and on behalf of the said City of Ottawa in any sum or sums whatever, nor had the city council of the said City of Ottawa ever been notified by the said commissioners of the issuance of any bonds or to levy or collect any taxes on
40 account of any such bonds for and on behalf of the said City of Ottawa.

And defendant further avers that the said bonds and coupons in plaintiff's declaration mentioned were executed by the said mayor and city clerk of defendant, and delivered to the said William H. W. Cushman for the benefit of the said Ottawa Manufacturing Company, and for no other purpose whatever.

And defendant further avers that the said Ottawa Manufacturing Company was then and there, and now is, a private corporation, organized for private business ends only, and was in no way connected with or controlled by the said defendant, and that the said bonds and coupons described in plaintiff's declaration were issued and delivered to the said William H. W. Cushman and the said Ottawa Manufacturing Company as a mere voluntary donation to the said Ottawa Manufacturing Company in the prosecution of a strictly private business enterprise, for the purpose of aiding the said Ottawa Manufacturing Company in establishing outside of the limits of said City of Ottawa a water-power, for hydraulic and manufacturing purposes, and the said bonds and coupons were not issued for any municipal purpose whatever, and so the defendant says that the said bonds and coupons in plaintiff's declaration mentioned were issued without any authority of law, all of which the plaintiff, at the time he purchased the said bonds and coupons, had full notice, without this that the defendant made, executed, or
41 delivered the said several bonds and coupons in said declaration mentioned, or any one of them, or became indebted by reason of the supposed making of said bonds or coupons, or any one of them, and of this defendant puts itself upon the country.

6. And for another and further plea, said defendant says actio non, because it says that said Shuler, as mayor, and said Waterman, as clerk, executed, issued, and delivered said bonds and coupons in the declaration mentioned without any authority whatever.

That there was no such authority, because no ordinance of the City of Ottawa therefor was ever adopted by the city council of said city, nor was any ordinance therefor ever submitted to the voters of said city, nor was any such ordinance ever voted for by a majority of the voters of said city attending an election to vote for or against any such ordinance as is provided in and by the city charter must be done to make said bonds valid, and so defendant says that said execution and delivery of said bonds were made by said Shuler and said Waterman as individuals merely, and without the authority either of the city council or of the voters of the city, and that said bonds and coupons are wholly void and of no effect, all of which defendant will verify, wherefore it prays judgment, &c.

7. And for a further plea in this behalf, the said defendant says actio non, &c., because it says that the said supposed bonds and coupons
42 in the plaintiff's declaration described were executed and delivered by the said mayor and city clerk of said defendant, and by no other or different persons, and that under and by virtue of the charter of the said City of Ottawa, defendant herein, the said mayor and city clerk had, nor had either of them, any power, authority, or right to execute or deliver said bonds, or any bonds of the said defend-

ant, unless specially authorized by ordinance of the city council of said City of Ottawa, defendant herein, so to do.

And defendant further avers that the only ordinance of said city council which in any way purports to authorize said mayor and said city clerk to execute or deliver said bonds or coupons, 'as an ordinance passed by the said city council on the 30th day of July, A. D. 1869, entitled "An ordinance to carry into effect the ordinance of June 15th, A. D. 1869, entitled 'An ordinance to provide for a loan for municipal purposes,'" which said ordinance of July 30th, A. D. 1869, was and is in the words and figures following, to wit:

"Whereas by an ordinance passed by the city council on the 15th day of June, 1869, it was provided that the mayor of the city should be authorized to borrow in the name of the city sixty thousand dollars, to be expended in developing the natural advantages of the city for manufacturing purposes, and to issue the bonds of the city therefor; and whereas it is provided by said ordinance that the same shall be submitted to the voters of the city to be voted for or against at
43 an election to be holden for that purpose on the 20th day of July, 1869; and whereas, at said election, the said ordinance was ratified by the voters of the city by a majority of 823 votes, being a majority of the legal voters of the city:

"Now, therefore, be it ordained by the city council of the City of Ottawa that the bonds of the city for the sum of sixty thousand dollars be issued by the mayor in accordance with the terms and conditions of said ordinance of June 15th, 1869, and that he deliver the same to William H. W. Cushman to be used by him in developing the natural resources of the surroundings of the city, and that the said Cushman is authorized and directed to expend the same in the improvement of the water power upon the Illinois and Fox Rivers within the city and in the immediate vicinity thereof under the franchises and powers which have been granted for that purpose by the legislature of the State, or which may hereafter be granted for that purpose in the manner which in his judgment shall best secure the practical and permanent use of said water power in the city and its immediate vicinity.

"Provided that said Cushman shall execute and deliver to the mayor an agreement from him to the City of Ottawa that he will, without unreasonable or unnecessary delay, cause a good, substantial, and sufficient dam to be constructed across the Illinois River above the city to bring into use all the available water power of said river at Ottawa,
44 and will construct sufficient head and tail races to make such water power available, said races to be constructed and continued to the Fox River below the aqueduct and above the island in Fox River as fast as the same may be required for actual use and as fast as said water power can be leased at fair and reasonable rates, and so be brought into actual operation, and that he will also erect a good, substantial, and sufficient dam across the Fox River so as to make available the water power of both rivers at Ottawa as soon as the additional water power created by such dam across Fox River can be brought into actual use by being leased at reasonable and fair rates, so as to have all the available water power of both rivers at Ottawa ready for use as rapidly as called for.

"And provided, also, that said Cushman shall bind himself that if said work is not constructed as aforesaid that he will return said bonds to the city or the value of the same, and save it harmless from all loss on account of the same or on account of interest accruing thereon.

"And in case said work shall not be completed by said Cushman then

to return a pro rata share of said bonds in the proportion that the cost of the work constructed shall bear to the part of the work not constructed, provided, that a lease of the dams above mentioned with the races necessary to make the water power thereby created available for practical use, shall be completed or the whole of said bonds shall be returned to the city by said Cushman."

45 And the defendant avers that in and by said ordinance so purporting to confer authority on the mayor of said city to execute and deliver said bonds and coupons, it appears that said mayor was directed to execute said bonds and coupons, and deliver the same to one William H. W. Cushman, without any consideration whatever, for the purpose of enabling said Cushman to carry on a private enterprise, which was and is an enterprise for other than the municipal or corporate purposes of this defendant.

Of all which matters and things the defendant avers the said plaintiff had notice at and before the purchase by them of the bonds and coupons in said declaration mentioned;

All of which it is ready to verify; wherefore it prays judgment.

8th. And for a further plea in this behalf the said defendant says actio non, &c., because it says that the said supposed bonds and coupons in the plaintiff's declaration described were executed and delivered by the said mayor and city clerk of said defendant, and by no other or different persons, and that under and by virtue of the charter of the said City of Ottawa, defendant herein, the said mayor and city clerk had not, nor had either of them, any power, authority, or right to execute or deliver said bonds or any bonds of the said defendant unless specially authorized by ordinance of the said city council of the said City of Ottawa, defendant herein, so to do.

46 And defendant further avers that the only ordinance of said city council which in any way purports to authorize said mayor or said city clerk to execute or deliver said bonds or coupons was an ordinance passed by the said city council of the 30th day of July, A. D. 1869, entitled "An ordinance to carry into effect the ordinance of June 15th, 1869, entitled 'An ordinance to provide for a loan for municipal purposes,'" which said ordinance of July 30th, A. D. 1869, was and is in the words and figures set out in the seventh special plea of this defendant herein pleaded.

And the defendant avers that in and by said charter of the said City of Ottawa, it was and is provided among other things as follows:

"Article 10, section 20. No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election held for that purpose."

And the defendant avers that the said ordinance of July 30th, A. D. 1869, was never submitted to or voted for by a majority of the voters of said city attending an election held for that purpose, and never was even submitted to said voters to be voted upon at any election whatever.

Of all which the defendant avers said plaintiffs had notice at and prior to the time of the purchase by them of the bonds and coupons in said declaration mentioned; all of which it is ready to verify; wherefore it prays judgment.

9th. And for a further plea in this behalf the said defendant says actio non, &c., because it says that the said supposed bonds and coupons

47 in the plaintiff's declaration described were executed and delivered by the said mayor and city clerk of said defendant, and by no other

or different persons; and that under and by virtue of the charter of the said City of Ottawa, defendant herein, the said mayor and city clerk had not, nor had either of them, any power, authority, or right to execute or deliver said bonds, or any bonds of the said defendant, unless specially authorized by ordinance of the city council of said City of Ottawa, defendant herein, so to do.

And defendant avers that the only ordinance of said city council which in any way purports to authorize said mayor or said city clerk to execute or deliver said bonds or coupons was an ordinance passed by the said city council on the 30th day of July, A. D. 1869, entitled "An ordinance to carry into effect the ordinance of June 15th, 1869, entitled 'An ordinance to provide for a loan for municipal purposes,'" which said ordinance of July 30th, 1869, was and is in the words and figures set forth in the seventh special plea of this defendant hereinbefore pleaded.

And the defendant avers that the said William H. W. Cushman, in said ordinance mentioned as the person to whom said mayor was authorized to deliver said bonds, was then and there the president of the Ottawa Manufacturing Company, which said company was then and there a private corporation, organized and existing under and by virtue of the laws of the State of Illinois, and then and there engaged as such private corporation in the private business thereof, and that said
48 corporation was not then and there engaged in any public or municipal business of this defendant, the said City of Ottawa, and that under and by virtue of the charter of said City of Ottawa, and amendments thereto, the said city had no right or authority by law to issue any bonds to said corporation, or to any one for its use, except under and by virtue of an act of the legislature of the State of Illinois entitled "An act to authorize the City of Ottawa to subscribe to the stock of the Ottawa Manufacturing Company," approved February 19, 1867, which said act was and is in the words and figures following:

An act to authorize the City of Ottawa to subscribe to the stock of the Ottawa Manufacturing Company.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, That William Reddick, Milton H. Swift, Jeremiah Wood, George Avery, and Richard Thorn be, and they hereby are, constituted a board of commissioners for and on behalf of said city to subscribe to the capital stock of "The Ottawa Manufacturing Company" the sum of one hundred thousand dollars, and when fully paid to receive and hold the stock of said company for the same, and the proceeds thereof, for and on behalf of said city.

2. In order to raise the money to enable said commissioners to make such subscription they are hereby authorized, for and on behalf of said city, to make, execute, and dispose of bonds of the same to the amount of one hundred thousand dollars, in sums of not less than one
49 thousand dollars, at a rate of interest not exceeding ten per centum per annum, payable in not less than ten years, irrevocably pledging the faith of said city for the ultimate redemption of the same and the payment of the interest thereon.

Such bonds shall not be disposed of by said commissioners for less than their par value.

3. The city council of said city is hereby authorized and required annually, after being notified by said commissioners of the issuance of such bonds, to levy and collect, as other taxes are levied and collected,

and at the same time and in the same manner, not less than six mills on each dollar of the assessed value of the real and personal property in said city. The proceeds of such tax shall be paid over by the collector of said city to the treasurer thereof, and by him kept as a separate fund, subject to the order of said commissioners, for the payment of the interest on said bonds, and in case of a surplus, said commissioners shall invest the same in bonds of the United States or of the State of Illinois, for the ultimate redemption of such bonds.

4. The said commissioners may appoint a president and secretary, who shall be treasurer. The latter shall give bonds to said city conditioned for the faithful discharge of his duties, and they may also appoint a proxy to vote on said stock at any meeting of the stockholders of said company, and instruct such proxy in what way to vote; but no vote shall be given on said stock for either of such commissioners for directors of said company.

5. Said commissioners may at any time dispose of such stock at not less than its par value, and any holder of any such bonds may at any time exchange the same for an equal amount of said stock.

In case of a sale of said stock, or of any portion of the same, said commissioners shall, if practicable, take up said balance, and if not, to invest the proceeds in bonds of the United States, or of the State of Illinois.

Said commissioners shall keep a record of their proceedings, and annually report to the city council their doings herein.

Said commissioners shall be allowed all reasonable expenses, but no compensation for their services. In case of a vacancy in said board by death, resignation, refusal, or neglect to act, or removal from the county of La Salle, the circuit court of said county shall fill such vacancy.

Approved February 19th, 1867.

And the defendant avers that the said act of February 19th, A. D. 1867, was and is an amendment and limitation of the charter of the said city of Ottawa, which said charter was an act of the legislature of the State of Illinois, entitled "An act to charter the City of Ottawa," approved February 10th, 1853, reference to which is hereby made, and that said charter and act were and are the same franchises and powers referred to in said ordinance of said city council, passed July 30th, 1869, as having been granted by the legislature of the State of Illinois, under and by which the said city was authorized, by board of commissioners appointed by said act, to subscribe to the stock of said Ottawa Manufacturing Company, of which the said William H. W. Cushman was then and there the president, and to issue and deliver to said Ottawa Manufacturing Company its bonds in payment thereof.

And defendant avers that said city of Ottawa was not authorized to issue its bonds to said William H. W. Cushman for the purpose recited in said ordinance, nor to said Ottawa Manufacturing Company, except in the manner and under the terms and conditions prescribed by the said act of February 19th, 1867.

And defendant further avers that said act gave no authority to the said city, or the city council thereof, or the mayor or clerk thereof, to execute the said bonds, but, on the contrary thereof, expressly provided and required that said bonds, if issued at all, should be issued by said board of commissioners.

That said board of commissioners were then and there the only cor-

porate authorities who were then and there by law authorized to issue said bonds or coupons, or any of them.

Of all which the said plaintiffs had notice at and prior to the purchase by them of the bonds and coupons in said declaration mentioned and described.

All of which this defendant is ready to verify; wherefore he prays judgment.

52 10th. And for a further plea in this behalf, the defendant says actio non, &c., because it says that the said defendant, the City of Ottawa, at the time of the execution and delivery of the supposed bonds and coupons in the said declaration mentioned, was, and from thence hitherto, has been, and still is, a municipal corporation of the State of Illinois, organized and existing under an act of the legislature of the State of Illinois, entitled "An act to charter the City of Ottawa," approved February 10th, 1853, and that by said charter it was, and is, among other things, provided by section 20, article 10 thereof, as follows:

"No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election held for that purpose."

And defendant avers that the only ordinances purporting to authorize the issuance of the bonds and coupons in said declaration mentioned were, and are, as hereinafter set forth:

First. An ordinance passed by the city council of said city on the 15th day of June, A. D. 1869, and referred to by its title in the body of each of said bonds, entitled "An ordinance to provide for municipal purposes," which said ordinance was, and is, in the words and figures following, to wit:

Be it ordained by the city council of the City of Ottawa: SECTION I. That the mayor of the city be, and he is hereby, authorized to borrow in the name of the city, at a rate of interest not exceeding ten

53 per cent., the sum of $60,000 for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued therefore in sums of five hundred dollars, with interest, payable annually.

Said bonds to be payable, one-third in five years, one-third in ten years, and one-third in fifteen years from the date thereof.

Provided that no application of the proceeds of said bonds, except for the purpose aforesaid, and in pursuance of an ordinance to be duly passed for that purpose by the city council for the faithful application of the proceeds of such bonds for the purpose aforesaid shall be fully secured by the city.

SECTION II. Be it also ordained that a sufficient sum to pay the interest on said loan shall be annually provided by taxation and set apart as a separate fund, and to be applied to the payment of the interest on said bonds, and for no other purpose.

SECTION III. The ordinance shall be submitted to the voters of the city to be voted for or against at *at* an election to be held for that purpose on the 20th day of July, 1869, and the manner of the determination shall be by depositing ballots, upon which shall be written or printed, "For the loan ordinance"; or, "Against the loan ordinance."

And the defendant avers that the rate of interest provided in said ordinance for the loan contemplated thereby was and is the rate of six per cent. per annum and no more.

54 And defendant avers that said ordinance was submitted to and voted for by a majority of the legal voters of said city, at an election held for that purpose on the 20th day of July, A. D. 1869.

And the defendant avers that neither the said city charter nor said ordinance gave to said mayor or said city clerk of said City of Ottawa any authority to execute or deliver said bonds or coupons to any person, but, on the contrary thereof, provided that said bonds should be issued by the said city council.

And defendant avers that thereafter and on, to wit, the 30th day of July, A. D. 1869, the said city council passed a further ordinance, entitled "An ordinance to carry into effect the ordinance of June 15th, 1869, entitled 'An ordinance to provide for a loan for municipal purposes,'" which said ordinance was and is in the words and figures set out in the seventh special plea of this defendant hereinbefore pleaded.

And this defendant avers that said last-mentioned ordinance never was submitted to the voters of said City of Ottawa, and *and* never was voted for by a majority of the voters of said city at any election whatever.

And the defendant avers that said last-mentioned ordinance was and is the only ordinance which purported to authorize said mayor or said city clerk to execute or deliver the bonds and coupons in said declaration mentioned.

And defendant further avers that said mayor and said city clerk had not, nor had either of them, any authority under and by virtue
55 of said charter of said City of Ottawa to execute said bonds, or any bonds of said city, unless specially authorized by ordinance of said city council so to do.

And defendant avers that said last-mentioned ordinance purported to authorize the delivery of said bonds to the said William H. W. Cushman, therein mentioned, for a purpose other and different from the purpose set forth and stated in said first-mentioned ordinance of June 15th, 1869, and for a purpose for which said city council never had passed any ordinance which had been submitted to the voters of said city or been voted for by a majority of said voters at any election whatever.

Of all which the said plaintiffs, at and prior to the time of the purchase by them of said bonds and coupons in said declaration mentioned, had notice.

All of which the defendant is ready to verify.

Wherefore it prays judgment.

11th. And for a further plea in this behalf the defendants says actio non, &c., because it says that this defendant is a municipal corporation, organized and existing under and by virtue of an act of the legislature of the State of Illinois, entitled "An act to charter the City of Ottawa," approved February 10th, 1853, which said charter is still in force, and, with the amendments thereto, still is the charter of this defendant.

And defendant avers that at the time of the supposed issue of the said bonds and coupons in said declaration mentioned, and it
56 then was, and from thence hitherto has been, and still is, provided by said charter, among other things, as follows:

"No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election held for that purpose."

And the defendant avers that no ordinance whatever providing for the issue of said bonds and coupons, or either of them, was ever submitted to or voted for by a majority of the voters of said city attending any election whatever.

Of all which matters and things the said plaintiffs, at and prior to the time of the purchase by them of the said bonds and coupons in said declaration mentioned, had notice.

All of which it is ready to verify.

Wherefore it prays judgment.

SAM'L RICHOLSON,
M. T. MOLONEY, &
LAWRENCE, CAMPBELL & LAWRENCE,
Its Att'ys.

(Endorsed:) Filed March 22, 1880. Wm. H. Bradley, clerk.

Afterwards, to wit, on the eleventh day of May, A. D. 1880, came said plaintiff, by its attorney, and filed in said clerk's office its special demurrer in said entitled cause, which said demurrer is in the words and figures following, to wit:

57 *Special Demurrer.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court in and for said district. March term, A. D. 1880.

THE FIRST NATIONAL BANK OF PORTSMOUTH, New Hampshire,
vs.
THE CITY OF OTTAWA.

And now comes the said plaintiff by G. S. Eldredge, its attorney, and as to the said defendant's pleas filed herein, numbered respectively from three (3) to thirteen (13), both inclusive, demurs thereto specially, and for sole cause of demurrer thereto says that said pleas, and each of them severally, amount to the general issue, and this it is ready to verify. Wherefore as to each and every of said pleas, said plaintiff prays judgment, &c., as to whether it, said plaintiff, is bound by law to answer any or either of them for the reason aforesaid.

G. S. ELBREDGE,
Pl'ff's Att'y.

(Endorsed:) Filed May 11, 1880. W. H. Bradley, cl'k.

Afterwards, to wit, on the twenty-third day of February, A. D. 1881, came said parties, by their attorneys, and filed in said clerk's office their stipulation in the following entitled causes. Which said stipu-
58 lation is in the words and figures following, to wit:

Stipulation.

U. S. circuit court, northern district of Illinois.

THE FIRST NATIONAL BANK OF PORTSMOUTH
vs.
THE CITY OF OTTAWA.

EDWARD P. KIMBALL
vs.
THE CITY OF OTTAWA.

WM. H. HASKELL ET AL., EX'RS, &C., OF W. H. T. Hackett, deceased,
vs.
THE CITY OF OTTAWA.

MARY E. MORRISON
vs.
THE CITY OF OTTAWA.

WM. G. SHACKFORD
vs.
THE CITY OF OTTAWA.

It is hereby stipulated that the depositions of Wm. H. T. Hackett & Edward P. Kimball, taken in the case lately pending in said court wherein said Wm. H. T. Hackett was originally plaintiff (& continued in the name
59 of his executors, after his decease), against the City of Ottawa, may be read in evidence on the trial of each of the above-entitled cases, it being admitted by the plaintiffs in said cases that the only title to the bonds & coupons sued upon which the plaintiffs have, is under the purchase thereof, so testified to by said Kimball & Wm. H. T. Hackett; and it is further stipulated that all the pleas filed in said causes, except the plea of non est factum and nil debet, shall be withdrawn and any and all matters set forth in said pleas so to be withdrawn, may be admitted in evidence, so far as they may be held by the court to be competent evidence, with the like effect in all respects as if such matters had been specially pleaded. And it is further stipulated that any other matter competent to be introduced in evidence on behalf of the defendant, & not covered by the pleas of nil debet & non est factum, may be introduced with the like effect as if the same was specially pleaded.

Dated May 7, 1880.

G. S. ELDREDGE,
Att'y for Pl'ff in above-entitled Cases.
SAMUEL RICHOLSON,
For the City of Ottawa.

It is further agreed that a jury-trial in the foregoing cases be
60 waived, and that said cases be submitted to the court for trial without a jury.

Dated Jan'y 12, 1880.

G. S. ELDREDGE, *Pl'ff's Att'y.*
LAWRENCE, CAMPBELL & LAWRENCE,
Att'y for Def't.

(Endorsed:) Filed Feb'y 23, 1881. Wm. H. Bradley, cl'k.

Of all which matters and things the said plaintiffs, at and prior to the time of the purchase by them of the said bonds and coupons in said declaration mentioned, had notice.

All of which it is ready to verify.

Wherefore it prays judgment.

SAM'L RICHOLSON,
M. T. MOLONEY, &
LAWRENCE, CAMPBELL & LAWRENCE,
Its Att'ys.

(Endorsed:) Filed March 22, 1880. Wm. H. Bradley, clerk.

Afterwards, to wit, on the eleventh day of May, A. D. 1880, came said plaintiff, by its attorney, and filed in said clerk's office its special demurrer in said entitled cause, which said demurrer is in the words and figures following, to wit:

57 *Special Demurrer.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court in and for said district. March term, A. D. 1880.

THE FIRST NATIONAL BANK OF PORTSMOUTH, New Hampshire,
vs.
THE CITY OF OTTAWA.

And now comes the said plaintiff by G. S. Eldredge, its attorney, and as to the said defendant's pleas filed herein, numbered respectively from three (3) to thirteen (13), both inclusive, demurs thereto specially, and for sole cause of demurrer thereto says that said pleas, and each of them severally, amount to the general issue, and this it is ready to verify. Wherefore as to each and every of said pleas, said plaintiff prays judgment, &c., as to whether it, said plaintiff, is bound by law to answer any or either of them for the reason aforesaid.

G. S. ELBREDGE,
Pl'ff's Att'y.

(Endorsed:) Filed May 11, 1880. W. H. Bradley, cl'k.

Afterwards, to wit, on the twenty-third day of February, A. D. 1881, came said parties, by their attorneys, and filed in said clerk's office their stipulation in the following entitled causes. Which said stipu-
58 lation is in the words and figures following, to wit:

Stipulation.

U. S. circuit court, northern district of Illinois.

THE FIRST NATIONAL BANK OF PORTSMOUTH
vs.
THE CITY OF OTTAWA.

EDWARD P. KIMBALL
vs.
THE CITY OF OTTAWA.

WM. H. HASKELL ET AL., EX'RS, &C., OF W. H. T. Hackett, deceased,
vs.
THE CITY OF OTTAWA.

MARY E. MORRISON
vs.
THE CITY OF OTTAWA.

WM. G. SHACKFORD
vs.
THE CITY OF OTTAWA.

It is hereby stipulated that the depositions of Wm. H. T. Hackett & Edward P. Kimball, taken in the case lately pending in said court wherein said Wm. H. T. Hackett was originally plaintiff (& continued in the name
59 of his executors, after his decease), against the City of Ottawa, may be read in evidence on the trial of each of the above-entitled cases, it being admitted by the plaintiffs in said cases that the only title to the bonds & coupons sued upon which the plaintiffs have, is under the purchase thereof, so testified to by said Kimball & Wm. H. T. Hackett; and it is further stipulated that all the pleas filed in said causes, except the plea of non est factum and nil debet, shall be withdrawn and any and all matters set forth in said pleas so to be withdrawn, may be admitted in evidence, so far as they may be held by the court to be competent evidence, with the like effect in all respects as if such matters had been specially pleaded. And it is further stipulated that any other matter competent to be introduced in evidence on behalf of the defendant, & not covered by the pleas of nil debet & non est factum, may be introduced with the like effect as if the same was specially pleaded.

Dated May 7, 1880.

G. S. ELDREDGE,
Att'y for Pl'ff in above-entitled Cases.
SAMUEL RICHOLSON,
For the City of Ottawa.

It is further agreed that a jury-trial in the foregoing cases be
60 waived, and that said cases be submitted to the court for trial without a jury.

Dated Jan'y 12, 1880.

G. S. ELDREDGE, *Pl'ff's Att'y.*
LAWRENCE, CAMPBELL & LAWRENCE.
Att'y for Def't.

(Endorsed:) Filed Feb'y 23, 1881. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the twenty-third day of February, A. D. 1881, in the December term, A. D. 1880, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

Before the Hon. Henry W. Blodgett, district judge:

THE FIRST NATIONAL BANK OF PORTSMOUTH, New Hampshire, *vs.* THE CITY OF OTTAWA. } Debt.

Now come the parties, by their attorneys, and on motion of the defendant, by its attorney, as per stipulation filed, leave is given to withdraw all its pleas herein, except the plea of non est factum, and the plea of nil debet, and any and all matters set forth in the special pleas so withdrawn may be admitted, so far as it may be held to be competent evidence, and, upon issue joined, by agreement of the par-
61 ties, as per stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court, and, after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards to wit: On the twenty-fourth day of February, A. D. 1881, in the December term, A. D. 1880, of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, appears the following entry to wit:

THE FIRST NATIONAL BANK OF PORTSMOUTH, New Hampshire, *vs.* THE CITY OF OTTAWA. } Debt.

Now come again the parties by their attorneys, and after hearing the concluding evidence and a part of the arguments of counsel, it is ordered that the further trial of the cause be postponed until tomorrow morning.

Afterwards to wit: On the twenty-fifth day of February, A. D. 1881, in the December term A. D. 1880, of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, appears the following entry, to wit:

62 THE FIRST NATIONAL BANK OF PORTSmouth, New Hampshire, *vs.* THE CITY OF OTTAWA. } Debt.

Now come again the parties by their attorneys and after hearing the concluding arguments of counsel upon the matters herein, the court takes the same under advisement.

Afterwards to wit, on the fifteenth day of July, in the July term, A. D. 1881, of said court, in the record of the proceedings thereof in said en-

titled cause before the Hon. Henry W. Blodgett, district judge, appears the following entry to wit:

THE FIRST NATIONAL BANK OF PORTSMOUTH, New Hampshire, *vs.* THE CITY OF OTTAWA. } Debt.

Now come the parties by their attorneys, and the court having considered and being now fully advised upon the matters heretofore submitted herein, finds the issue for the plaintiff; and finds its debt in the sum of forty-eight hundred dollars, and assesses its damages to the sum of eight hundred and ninety-eight dollars and eighty-two cents.

63 It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of forty-eight hundred dollars its debt, and the said sum of eight hundred and ninety-eight dollars and eighty-two cents its damages, making the sum of five thousand six hundred and ninety-eight dollars and eighty-two cents for both debt and damages, together with its costs and charges in this behalf expended, amounting to the sum of fifty-four dollars and fifteen cents.

On the same day to wit: the fifteenth day of July A. D. 1881, there was filed in said clerk's office the certificate of special findings by the court in said entitled cause, which were duly signed and made of record therein, and read in the words and figures following, to wit:

64 *Certificate of findings by the court.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof, December term thereof, A. D. 1880.

THE FIRST NATIONAL BANK OF PORTSMOUTH *vs.* THE CITY OF OTTAWA. } Action of debt.

Be it remembered that heretofore, to wit, on the 23d day of February, A. D. 1881, the above-entitled cause came on for trial, and it was then and there agreed by and between the plaintiff and defendant by an instrument of writing, signed by the respective counsel, and filed in said cause, that a jury should be waived, and said cause should be submitted to the court for trial; and the parties having also agreed that any and all defences to said action, which would be admissible under any special plea herein, should also be admitted under the general issue, and the court having heard all the evidence in said cause, doth find the following facts:

65 First. The City of Ottawa, defendant herein, has been from the 10th day of February, A. D. 1853, a city of the State of Illinois, incorporated under a charter which, among other things, contains the following:

"Article 5. Sec. 1. The city council shall have power and authority to levy and collect taxes upon all property, real and personal within the limits of the city not exceeding one-half of one per cent. per an-

num upon the assessed value thereof, and may enforce the payment of the same in any manner to be prescribed by ordinance not repugnant to the constitution of the United States and of this State.

Article 5, Sec. 3. "The city council shall have power * * * to establish, support and regulate common schools, to divide the city into school districts, to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereon, provided that no sum or sums of money shall be borrowed at a greater interest than at 10 per cent. per annum."

Article 10, Sec. 20. No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election held for that purpose.

Second. That said charter has been amended from time to time as follows: by an act approved March 1st, 1854, entitled "An act to amend the charter of the City of Ottawa authorizing said city to
66 take stock in a bridge company therein named, and providing that the corporate authorities of said city may levy a tax therein for the purpose of paying the interest upon any bonds for other securities issued by the city for that purpose: said tax shall be levied as other taxes for said city purposes are or may by law required to be."

Also by an act entitled, "An act to authorize the City of Ottawa to subscribe to the stock of the Ottawa Manufacturing Company," as follows:

SECTION 1. Be it enacted by the people of the State of Illinois represented in the general assembly: that William Reddick, Milton H. Swift, Jeremiah Wood, George Avery and Richard Thorn be and they hereby are constituted a board of commissioners for and on behalf of said city to subscribe to the capital stock of the Ottawa Manufacturing Company the sum of one hundred thousand dollars, and when fully paid to receive and hold the stock of said company for the same, and the proceeds thereof for and on behalf of said city.

2. In order to raise the money to enable said commissioners to make such subscription they are hereby authorized for and on behalf of said city to make, execute, and dispose of bonds of the same to the amount of one hundred thousand dollars, in sums of not less than one thousand dollars, at a rate of interest not exceeding ten per centum per annum, payable in not less than ten years irrevocably pledging the faith
67 of said city for the ultimate redemption of the same, and the payment of the interest thereon. Such bonds shall not be disposed of by said commissioners for less than their par value.

3. The city council of said city is hereby authorized and required, annually, after being notified by said commissioners of the issuance of such bonds, to levy and collect, as other taxes are levied and collected, and at the same time and in the same manner, not less than six mills on each dollar of the assessed value of the real and personal property in said city.

The proceeds of such tax shall be paid over by the collector of said city to the treasurer thereof and by him kept as a separate fund, subject to the order of said commissioner', for the payment of the interest of said bonds, and in case of a surplus said commissioners shall invest the same in bonds of the United States, or of the State of Illinois, for the ultimate redemption of such bonds.

4. The said commissioners may appoint a president and secretary who shall be treasurer. The latter shall give bonds to said city, con,

ditioned for the faithful discharge of his duties, and they may also appoint a proxy to vote on said stock at any meeting of the stockholders of said company, and instruct such proxy in what way to vote, but no vote shall be given on said stock for either of such commissioners for directors of said company.

5. Said commissioners may at any time dispose of such stock at not less than its par value, and any holder of any such bonds may at
68 any time exchange the same for an equal amount of said stock. In case of a sale of said stock, or of any portion of the same, the said commissioners shall, if practicable, take up said balance, and if not, to invest the proceeds in bonds of the United States, or of the State of Illinois. Said commissioners shall keep a record of their proceedings, and annually report to the city council their doings herein. Said commissioners shall be allowed all reasonable expenses, but no compensation for their services.

In case of a vacancy in said board by death, resignation, refusal or neglect to act, or removal from the county of La Salle, the circuit court of said county shall fill such vacancy. Approved February 19th, 1867.

Also, by an act to amend an act entitled "An act to charter the City of Ottawa," approved February 10, 1853, as follows:

SECTION 1, chapter 2. When the bonds now held against the City of Ottawa shall become due, the city council of said city are hereby authorized to cause other bonds, for the same sum or sums, and on the same terms, and for such time as the city council may deem proper, to be issued and delivered to the holders of said bonds now held against said city.

And the city council are hereby authorized, in addition to the taxes now authorized to be levied and collected by said city, to levy and collect, in the same manner and at the same time as other city taxes are levied and collected, a tax not exceeding two mills on each
69 dollar of the assessed value of the real and personal property in said city, said tax, when collected, to be paid to the city treasurer and by him kept as a separate fund to pay off the bonds so held against said city. Said separate fund may be invested in bonds of the United States or of this State.

Approved March 5, 1867.

Third. That on or about the first day of July, A. D. 1867, the commissioners appointed by the said act of February 19, 1867, viz. William Reddick, Milton H. Swift, Jeremiah Wood, George Avery, and Richard Thorn met and duly organized as such board of commissioners by electing Milton H. Swift president and John F. Nash secretary of said board of commissioners; that after the organization of said board of commissioners and prior to the 15th day of June, A. D. 1869, the city council took steps to secure a subscription by the said board of commissioners to the capital stock of said Ottawa Manufacturing Company, and to secure shares of its stock therefor under said act of February 19, 1867; but said board of commissioners failed to make such subscription and to procure such stock in that behalf.

Fourth. That on the 15th day of February, 1851, the legislature of the State of Illinois passed an act to authorize certain persons to construct a dam across Fox River for hydraulic and manufacturing purposes, which act was as follows:

Be it enacted by the people of the State of Illinois represented in the general assembly.

SECTION 1. That William H. W. Cushman, George E. Walker, John V. A. Hors, George H. Harris, Lorenzo Leland, and Henry G. Colton, or such of them, or such other persons as may choose to associate with them by subscribing to the stock of a company as hereinafter authorized, are hereby created a body corporate and politic by the name of the Ottawa Manufacturing Company, and by that name shall have perpetual succession, and be capable of contracting and being contracted with, of sueing and being sued, of acquiring, either by purchase or under the provisions of this act as hereinafter authorized, and of holding real estate and personal property for the purposes contemplated and authorized by this act, or in discharge of debts due the said corporation, and of using and disposing of the same; may have a common seal, which they may alter at pleasure, and may make all needful by-laws for the government of the *country*, its officers, and the management of its affairs, and alter the same at pleasure; may appoint or provide for the election of such officers and agents as may be deemed necessary, and prescribe the duties and liabilities of all the officers of said company.

SECTION 2. The said company, when formed, are hereby authorized to build a dam across Fox River on section eleven or twelve in
71 township thirty-three north, of range three east, in La Salle County, for the purpose of creating water power; and the said company may use, lease, or otherwise dispose of the same, and may construct such other works, buildings, and machinery as may be deemed necessary or proper to use such water and to promote the interests and objects of the *country*.

SECTION 3. The said company, having first obtained the assent of the corporate authorities of the town of Ottawa, may use any of the streets, alleys, or public grounds in the said town for the purpose of erecting such power or of using or applying the same as herein provided and authorized.

SECTION 4. The capital stock in said company shall not exceed fifty thousand dollars, which shall be divided into shares of one hundred dollars each.

SECTION 5. The persons named in the first section of this act or a majority of them, or of the survivors of them, if any shall die, may cause books of subscription to the capital stock of said company to be opened at some public place, after having given notice of the same for at least 30 days, by publication in some newspaper printed in said county; any person may become a stockholder in said company by subscribing at least one share and paying the same and all the assessments thereon when called for. Each share shall be entitled to one
72 vote in all the proceedings or elections of said company, which may be given in person or by proxy.

SECTION 6. After five thousand dollars of the stock of said company shall be subscribed and ten per cent. thereon paid in, an election may be held for not less than three nor more than seven directors, of which the same notice shall be given as required in section five; at the same time and place; such articles of association and by-laws as may be deemed best for the government of the *country* and its officers and the management of its affairs may be adopted.

SECTION 7. The directors shall hold their offices for one year and until their successors are chosen, which may be provided for in the articles of association or by-laws of said company. The directors shall

have the management of all the business of said corporation, the application of its funds, the disposition of its property, and shall make all contracts and conveyances; all of which, however, shall be in accordance with the articles of association and by-laws of said corporation.

SECTION 8. The said corporation, for the purposes herein expressed and authorized, may enter upon and take or flow any real estate deemed necessary, provided that the said company shall pay the value of such real estate and damage done by flowing or injuring lots or lands by the erection of the said dam or any of the work for the company, for the
73 purpose of ascertaining the value of such real estate, or the amount of such damage the said company may apply by petition to the circuit court of said county, in which petition shall be set forth the point, as near as may be, at which the said company propose to build the said dam, or at which the same is built, and the height to which they propose to erect or have erected the same above low or the ordinary stage of water in said river, the property, particularly describing it, taken or proposed to be taken for the purposes herein authorized, or to be flowed, occupied, or injured by the works of said company; notice shall be given of the filing of such petition or of the intention so to do, personally to the owner, if known, and by publication in at least two newspapers printed in said county, once in each for six weeks, stating in such notice the facts required to be set forth in the petition, the last of which publication shall be at least sixty days prior to the date on which said petition is heard or acted upon by said court.

Any person owning or having an interest in such real estate or any part thereof, may, upon application, by filing in the court a statement of such ownership or interest, verified by his or her affidavit, be heard in such proceeding. Upon the hearing of such petition the said court shall appoint five commissioners, who shall be disinterested, and who shall take an oath faithfully to discharge the duties of their office,
74 any three of whom be competent to act. The said commissioners, or a majority of them, shall at such time and place as the said court may direct, proceed to examine and estimate the value of such real estate as is proposed to be taken, and the injury which may be done by the said dam or works of said company to the real estate flowed or to be flowed or injured thereby.

The said commissioners may administer oaths and hear any evidence offered, and may personally inspect the property, and in estimating the damages shall consider the benefits to result from the works of said company.

The commissioners shall report to said court, stating the value of such real estate, and the damages, setting forth the value of or damage to each parcel of real estate separately.

The said court, upon receiving such report, shall make an order condemning such real estate to the use of said company, or its works, and the company shall thereupon on demand pay to the persons legally entitled thereto the amount so ascertained; provided, the said court may, for good cause shown, order a reassessment of the value or damages of such real estate, or any portion thereof. The said company shall also pay all the costs of the proceedings.

SECTION 9. Any person owning lands taken, flowed, or injured may, in like manner, apply to said court to have the value of the same
75 or the injury thereto ascertained, but no other or further proceedings shall be had against said company.

SECTION 10. This act shall be considered a public act.
Approved February 15, 1851.

Fifth. That on the 16th day of February, A. D. 1865, another act, entitled "An act to amend an act entitled 'An act to authorize certain persons to construct a dam across Fox River for hydraulic and manufacturing purposes,'" approved February 15, 1851, which said act is as follows:

Be it enacted by the people of the State of Illinois, represented in the general assembly:

SECTION 1. That the said company shall have, in addition to the powers granted in and by the said act to which this is an amendment, the right, for all the purposes mentioned in the said act, to build a dam across the Illinois River, at such point as the said company may elect, and also the right to construct a race or races for the purpose of introducing the water of the Illinois River into the pool of the dam authorized to be erected across Fox River; and for any or all the purposes contemplated by this act and by the act to which this is an amendment, may take and use such portion of any highway, street, alley, or public ground as may be deemed necessary.

SECTION 2. Section nine (9) of the act to which this is an
76 amendment is hereby amended, by adding at the end of the same the following:

"Provided that no action or other proceeding shall be had against such company on account of the erection of said dams, race or races, unless within one year after the erection or construction of the same, or any or either of them."

SECTION 3. The fourth (4) section of said act to which this an amendment shall read as follows:

"The capital stock of said company may be fixed by the same and divided into shares, and may be increased or diminished."

SECTION 4. The name of "Henry G. Colton" in the first section of the said original act is stricken out, and the names of "Dwight Cameron" and "John F. Nash" are hereby inserted in its stead.

Approved February 16, 1865.

Sixth. On the 15th day of June, 1869, the City of Ottawa adopted the following ordinances:

First, an ordinance to provide for a loan for municipal purposes—

SEC. 1. Be it ordained by the city council of the city of Ottawa that the mayor of the city be, and he is hereby, authorized to borrow in the name of the city, at a rate of interest not exceeding 10 per cent., the sum of $60,000 for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued therefor in sums of $500, with
77 interest payable annually, said bonds to be payable, one-third in five years, one-third in 10 years, and one-third in fifteen years after the date thereof, provided that no application shall be made of the proceeds of said bonds, except for the purpose aforesaid, and in pursuance of an ordinance to be duly passed for that purpose by the city council, nor until the faithful application of the proceeds of such bonds to the purpose aforesaid shall be fully secured to the city.

SEC. 2. Be it also ordained that a sufficient sum to pay the interest on said loan shall be annually provided by taxation, and set apart as

a separate fund and to be applied to the payment of the interest on said bonds, and for no other purpose.

SEC. 3. This ordinance shall be submitted to the voters of the city, to be voted for or against at an election to be held for that purpose on the 20th day of July, 1869; the manner of the determination shall be by depositing ballots upon which shall be written orprinted "For the loan ordinance," or "Against the loan ordinance."

Second. On the 30th day of July, 1869, an ordinance to carry into effect the ordinarce of June 15, 1869, entitled "An ordinance to provide for a loan for municipal purposes," as follows:

Whereas, by an ordinance passed by the city council on the
78 15th day of June, 1869, it was provided that the mayor of the city should be authorized to borrow in the name of the city $60,000 to be expended in developing the natural advantages of the city for manufacturing purposes, and to issue the bonds of the city therefor; and whereas it was provided by said ordinance that the same should be submitted to the voters of the city to be voted for or against at an election to be holden for that purpose on the 20th day of July, 1869; and whereas, at said election, the said ordinance was ratified by the voters of the city by a majority of 843 votes, being a majority of the legal voters of the city:

Now, therefore, be it ordained by the city council of the city of Ottawa, that the bonds of the city for the sum of $60,000 be issued by the mayor in accordance with the terms and conditions of said ordinance of June 15th, 1869, and that he deliver the same to Wm. H. W. Cushman, to be used by him in developing the natural resources of the surroundings of the city, and that the said Cushman is authorized and directed to expend the same in the improvement of the water power upon the Illinois and Fox Rivers, within the city and in the immediate vicinity thereof, under the franchises and powers which had been granted for that purpose by the legislature of the State; or which may hereafter be granted for that purpose, in the manner, which in
79 his judgment shall best secure the practical and *and* permanent use of said water-power in the city and its immediate vicinity, provided that said Cushman shall execute and deliver to the mayor an agreement from him to the City of Ottawa that he will, without unreasonable or unnecessary delay, cause a good, substantial, and sufficient dam to be constructed across the Illinois River, above the city, to bring into use all the available water-power of said river at Ottawa, and will construct sufficient head and tail races to make such water-power available, said races to be constructed and continued to the Fox River, below the acqueduct and above the island in Fox River, as fast as the same may be required for actual use, and as fast as said water-power can be leased at fair and reasonable rates, and be brought into actual operation; that he will also erect a good, substantial, and sufficient dam across Fox River, so as to make available the water-power of both rivers at Ottawa as soon as the additional water-power created by such dam across Fox River can be brought into actual use by being leased at reasonable and fair rates so as to have all the available water power of both rivers at Ottawa ready for use as rapidly as called for; and provided, also, that said Cushman shall bind himself that if said work is not constructed as aforesaid that he will return said bonds to the city, or
80 the value of the same, and save it harmless from all loss on account of the same, or on account of interest accruing thereon,

and in case said works shall not be completed by said Cushman then to return the pro-rata share of said bonds in the proportion that the cost of the work constructed shall bear to the part of the work not constructed, provided that at least one of the dams above mentioned, with the races necessary to make the water-power thereby created available for practical use, shall be completed, or the whole of said bonds shall be returned to the city by said Cushman, the intent of this ordinance being to secure the improvement and developing of said water-power in this city by appropriating the loan obtained under the ordinance aforesaid for that purpose, or pro rata so far as said water-power shall be made availablefor practical use.

That under said ordinance of June 15th an election was held and a majority of the voters of Ottawa voted in favor of issuing said bonds.

In addition to the foregoing ordinances the following proceedings of the city council of the City of Ottawa in relation to said bonds were had, and the agreement with said Cushman, as appears from the records of said city council, on the 14th day of June, 1870, at a regular meeting of said city council: * * * On motion of Fiske, ordered that
81 a committee consisting of the mayor and three aldermen be appointed to wait upon W. H. W. Cushman and ascertain from him positively and definitely at what time he proposed to commence the work of the improvement of the water-power in the vicinity of Ottawa, as per contract between him and the City of Ottawa, July 12th, 1869. At a regular meeting of said council the special committee appointed to confer with W. H. W. Cushman in relation to the contract between him and the City of Ottawa in the matter of the improvement of the water-power in the vicinity of Ottawa, reported that the committee had waited upon Mr. Cushman, and from him had received the positive assurance that the "stakes were now stuck," that all the arrangements for the prosecution of the work were now perfected, and that before one year from this date the water would be pouring over the dam contracted to be constructed across the Illinois River.

And also the following proceedings of the city council of the City of Ottawa in relation to said bonds, viz:

TUESDAY, *May* 11, 1869.

Regular meeting. Present, Mayor Shuler, and Alderman Fiske, Thomas, Freeman, Brunker, Hughes, Leonard, Clifford, Colwell, Osman, Burke, Bosserman, Moore, and Calkins. * * * Colewell submitted the following resolution, which was, on motion of Calkins, adopted:

Resolved, That the commissioners appointed to take stock for
82 the City of Ottawa to the am'nt of $100,000 in the Ottawa Manufacturing Company be requested to take such stock in the corporation created by the act entitled "An act to incorporate the Ottowa Manufacturing Company, and to authorize said company to build a dam across the Illinois River, and to use the water-power thereby created, approved Feb'y 15th, 1851."

Which was revived and amended by a supplementary act approved Feb'y 10th, 1865.

Provided said corporation will organize and open its books for subscription immediately; and provided further, that it will commence improving the water-power at the earliest moment practicable.

On motion of Colwell, ordered that a committee of three be appointed to confer with the Ottawa Manufacturing Company in relation to pro-

visions as in resolution directing commissioners to take stock for the City of Ottawa to the am't of $100,000 in said company.

Mayor Shuler appointed Colwell, Osman, and Fiske said committee.

Seventh. That the bonds set out in the declaration were issued according to their date and face, as set forth in the declaration, and delivered to Wm. H. W. Cushman on the 2nd day of August, A. D. 1869, under the following agreement:

83 This agreement made this 2d day of August, A. D. 1869, between William H. W. Cushman of Ottawa, Illinois, party of the first part, and the City of Ottawa, in the county of La Salle, Illinois, party of the second part witnesseth: That whereas the said Cushman has received from the City of Ottawa aforesaid, the bonds of said city to the amount of sixty thousand dollars, to be used in developing the natural resources of the city, and to be expended in the improvement of the water-power upon the Illinois and Fox Rivers within the city and in the immediate vicinity thereof, said bonds having been issued by said city in pursuance of an ordinance passed by the city council of said city on the 15th day of June, A. D. 1869, entitled "An ordinance to provide for a loan for municipal purposes," which was ratified by the voters of the said city on the 20th day of July, A. D. 1869, and of an ordinance passed by the city council of said city on the 30th day of June, A. D. 1869, entitled "An ordinance to carry into effect the ordinance of June 15th, 1869, entitled 'An ordinance to provide for a loan for municipal purposes.'"

Now, therefore, in consideration of the premises the said William H. W. Cushman for himself, his heirs, executors, and admin' doth by these presents covenant and agree to and with the City of Ottawa aforesaid, that he will, without unreasonable or unnecessary delay, cause

84 a good and substantial dam to be constructed across the Illinois River above the city sufficient to bring into use all the available water-power of said river at Ottawa, and will construct sufficient head and tail races to make such water-power available, said races to be constructed and continued in Fox River below the acqueduct and above the island as fast as the same may be required for actual use, and as fast as the water-power can be leased at fair and reasonable rates, and that he will also construct a good, substantial, and sufficient dam across the Fox River below the acqueduct whenever the same shall be necessary to make available the water-power of both rivers at Ottawa, and be necessary for the use of said water-power; and whenever the said water-power made available by the construction of said dam across Fox River can be leased at fair and reasonable rates, so as to have all the available water-power of both rivers at Ottawa ready for use as rapidly as called for.

And said Cushman also binds himself, his heirs, executors, and administrators, to and with said city that in case said work is not performed to the extent of constructing a dam across the Illinois River and races to make water-power thereby created available for

85 practical use, that he will return said bonds, or the value thereof, to the city, and save and keep harmless the said city from all loss on account of the same or on account of the interest accruing thereon, and in case the work shall be performed to the extent above indicated, but shall not be completed by the construction of all the dams and races heretofore specified, then said Cushman shall return to said city a pro-rata share of said bonds, or the value thereof, in proportion that the cost of the work constructed shall bear to the cost of

that part of the work not constructed, the said Cushman to be exonerated from all liability of any kind to the city or on account of said bonds, when he shall have performed the agreements herein expressed, to be performed by him at the times stipulated for the performance of the same, the bonds being appropriated by the city to secure the completion of said work, and without other consideration than the public benefit resulting to the city thereby; and it is hereby agreed that nothing in this contract nor in the ordinances therein referred to shall give to said city any right, title, interest, or ownership either in law or in equity in the said improvements when completed according to the conditions and stipulations herein contained.

In witness whereof the said William H. W. Cushman has here-
86 unto set his hand and seal the day and year above written.

WILL. H. W. CUSHMAN.

And said City of Ottawa received no stock in said manufacturing company, or other consideration for said bonds other than the said contract with said Cushman hereinbefore set out; but the same were issued as a donation by the City of Ottawa to said Cushman to be applied by said Cushman individually, or under such franchises as were or might be granted for the purpose of making said improvement, and the same were issued and delivered by the mayor and clerk of said City of Ottawa and not by the commissioners created by said act of the legislature, and without being placed in the hands of the commissioners aforesaid, appointed under the above recited act, approved March 19th, 1867, and were issued and delivered to said Cushman, and there was no consent of said commissioners to the issue of said bonds, and said commissioners took no part in the issue of said bonds.

Eighth. That no money whatever was borrowed by the mayor of the city of Ottawa under and by virtue of the said ordinances of the city of Ottawa passed June 15th, 1869, and July 30th, 1869, but said bonds of the City of Ottawa were, on the 2d day of August, A. D. 1869, executed and delivered to said William H. W. Cushman by said
87 mayor as a donation to aid it in securing the contemplated water-power in the city and its immediate vicinity, as hereinbefore set forth.

Ninth. That on the 11th day of March, A. D. 1871, the said William H. W. Cushman delivered the said bonds to the said Ottawa Manufacturing Company to be used by the said company for the purpose of making the improvement hereinbefore mentioned, and without further consideration, and without his endorsement thereon, said Cushman being at the time a director in *in* said Ottawa Manufacturing Company.

Tenth. That said Ottawa Manufacturing Company at once entered upon the work of constructing the dams and races, and partially constructed the same under the powers granted to it as above set forth, and completed said work so that some water-power was created; but that said dam was carried away by a freshet in 1872 or 1873, and has never been reconstructed.

Eleventh. That on the 13th day of April, A. D. 1871, the plaintiff purchased the bonds in suit for their face value, at Portsmouth, in the State of New Hampshire, without any endorsement whatever, and the city, defendant, paid the interest on the bonds due August 2d, 1870, & 1871.

88 Twelfth. That the plaintiff in this cause took said bonds without any endorsement thereon; but without notice of any of the defences set up in this cause.

Thirteenth. And when said bonds were read in evidence they were objected to by the defendant, because they had not been endorsed by the payee therein named, but the court admitted the same, and the defendant excepted thereto.

Upon the finding of the foregoing facts the court finds the issue for the plaintiff, and finds the debt $4,800.00, and the damages $898.82, for which the court renders judgment for the plaintiff, to which finding of the issue and judgment the defendant at the time excepted, and the court orders the foregoing findings to be made a part of the record.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed July 15, 1881. Wm. H. Bradley, clerk.

89 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein the said The National Bank of Portsmouth is the plaintiff, and the said The City of Ottawa is the defendant, as appears from the records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Chicago, in said district, this fifth day of October, A. D. 1881.

[SEAL.] WM. H. BRADLEY, *Clerk.*

90 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States, for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between the First National Bank of Portsmouth, New Hampshire, plaintiff, and The City of Ottawa, defendant, in an action of debt, a manifest error hath happened, to the great damage of the said The City of Ottawa as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1881, in the Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of July, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the 106th year.

[SEAL.] WM. H. BRADLEY,
Clerk U. S. Circuit Court Nor. Dist. Ill.

(Indorsed:) Supreme Court of the United States. The First National Bank of Portsmouth, New Hampshire, vs. The City of Ottawa. Writ of error.

91 Supreme Court of the United States, October term, 1881.

WILLIAM H. CARY
vs.
THE CITY OF OTTAWA. } Error to circuit court U. S. north. dist. of Illinois.

Assignment of errors.

1st. The court erred in admitting in evidence the said bonds, or either of them, on which said declaration was filed and suit brought in the above-entitled cause, said bonds not being endorsed by the payee thereof.

2nd. The court erred in rendering judgment in favor of the plaintiff below, and in not rendering it in favor of the said defendant.

3rd. The court erred in rendering the judgment in manner and form aforesaid.

LAWRENCE, CAMPBELL & LAWRENCE,
M. T. MALONEY,
Att'ys for Pl'f in Error.

C. B. LAWRENCE,
Of Counsel.

92 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the First National Bank of Portsmouth, New Hampshire, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1881, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The City of Ottawa is plaintiff, and you, the said First National Bank of Portsmouth, New Hampshire, are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett this sixth day of October, in the year of our Lord one thousand eight hundred and eighty-one.

H. W. BLODGETT, *Judge.*

93 (Indorsed:) Supreme Court of the United States. The City of Ottawa vs. The First National Bank of Portsmouth, New Hampshire. Citation to October term, A. D. 1881.

STATE OF ILLINOIS,
La Salle County, ss:

Samuel Richolson, being first sworn, upon his oath doth now depose and say that he personally delivered a correct copy of the within citation to Geo. S. Eldredge, who is attorney for the said First National Bank of Portsmouth, New Hampshire, in said cause.

SAM'EL RICHOLSON.

Subscribed and sworn to before me this 7th day of October, A. D. 1881.

[SEAL.]

BENJ. F. LINCOLN,
Notary Public.

I have received a correct copy of the within citation this 7th day of October, A. D. 1881.

THE FIRST NATIONAL BANK OF PORTSMOUTH,
G. S. ELDREDGE, *Its Att'y.*

(Indorsement on cover:) No. 1048. The City of Ottawa, plaintiff in error, vs. The First National Bank of Portsmouth, New Hampshire, N. Illinois, C. C. U. S. Filed 14th October, 1881.

IN THE

Supreme Court of the United States,

October Term, A. D. 1881.

CITY OF OTTAWA,
Plaintiff in Error,

vs.

BANK OF PORTSMOUTH
Defendant in Error.

Error to Circuit Court, Northern District of Illinois.

Brief and Argument for Plaintiff in Error.

LAWRENCE, CAMPBELL & LAWRENCE,

AND

M. T. MALONEY,

For Plaintiff in Error.

C. B. LAWRENCE,

Of Counsel.

Beach, Barnard & Co., Legal Printers, 104 Randolph Street, Chicago.

IN THE

Supreme Court of the United States,

October Term, A. D. 1881.

CITY OF OTTAWA,
Plaintiff in Error,
vs.
BANK OF PORTSMOUTH,
Defendant in Error.

Error to Circuit Court, Northern District of Illinois.

STATEMENT.

This suit is upon a part of the same series of bonds involved in the case of *City of Ottawa* v. *Carey*, the record in which was filed at the same time with the record in the present case. In that case the Circuit Court, which tried the case without a jury, found the holder of the bonds had full notice of all the circumstances, which, as we contend, rendered the bonds invalid. In this case the court found the holder of the bonds to be a purchaser without notice. This fact cuts us off from the defenses made under the second, fourth and fifth points of our argument in *City of Ottawa* v. *Carey*, unless the court shall re-consider its former decision in *Hackett* v. *City of Ottawa*, rendered at the October term, 1878. The first and third points remain.

We annex the findings of the court in this cause. They differ from the findings in the other case only in this that in this case the court found the plaintiff to have been a purchaser without notice, and in the Carey case, a purchaser with notice. The text of the findings in the two cases is the same down to the eleventh subdivision.

THE FOLLOWING IS, IN FULL, THE FINDINGS OF FACT BY THE COURT.

Be it remembered that heretofore, to wit, on the 23rd, day of February, A. D. 1881, the above entitled cause came on for trial, and it was then and there agreed by and between the plaintiff and defendant, by an instrument of writing, signed by the respective counsel, and filed in said cause, that a jury should be waived, and said cause should be submitted to the court for trial, and the parties having also agreed that any and all defenses to said action, which would be admissible under any special plea herein, should also be admitted under the general issue, and the court having heard all the evidence in said cause, doth find the following facts.

FIRST. The city of Ottawa, defendant herein, has been from the 10th day of February, A. D. 1853, a city of the State of Illinois, incorporated under a charter which, among other things contains the following:

"Article 5, Section 1. The city council shall have "power and authority to levy and collect taxes upon all "property, real and personal, within the limits of the city, "not exceeding one-half of one per cent. per annum upon "the assessed value thereof, and may enforce the pay- "ment of the same in any manner to be prescribed by "ordinance not repugnant to the constitution of the United "States, and of this State."

"Article 5, Sec. 3. The city council shall have power "* * * * * * * to establish, support and regulate "common schools, to divide the city into school districts, "to borrow money on the credit of the city, and to issue "bonds therefor, and pledge the revenue of the city for "the payment thereof, provided, that no sum or sums of

" money shall be borrowed at a greater interest than at " ten. per cent. per annum."

" Article 10, Sec. 20. No money shall be borrowed " by the city council until the ordinance passed therefor " shall be submitted to, and voted for by, a majority of " the voters of said city, attending an election held for " that purpose."

SECOND. That said charter has been amended from time to time, as follows: By an act approved March 1st, 1854, entitled " An act to amend the charter of the city " of Ottawa, authorizing said city to take stock in a bridge " company therein named, and providing that the cor- " porate authorities of said city may levy a tax therein for " the purpose of paying the interest upon any bonds or " other securities issued by the city for that purpose; said " tax shall be levied as other taxes for said city purposes " are, or may by law be, required to be."

Also, by an act entitled, " An act to authorize the city " of Ottawa to subscribe to the stock of the Ottawa " Manufacturing Company," as follows:

" *Be it enacted by the people of the State of Illinois, represented in General Assembly:*

" SECTION 1. That William Reddick, Milton H. Swift, " Jeremiah Wood, George Avery and Richard Thorne, " be and they hereby *are* constituted a board of commis- " sioners for and on behalf of said city, to subscribe to the " capital stock of the Ottawa Manufacturing Company " the sum of one hundred thousand dollars, and, when " fully paid to receive and hold the stock of said company " for the same, and the proceeds thereof for and on behalf " of said city.

" SEC. 2. In order to raise the money to enable said

"commissioners to make such subscriptions, they are "hereby authorized, for and on behalf of said city to "make, execute and dispose of bonds of the same to the "amount of one hundred thousand dollars, in sums of not "less than one thousand dollars, at a rate of interest not "exceeding ten per centum per annum, payable in not less "than ten years, irrevocably pledging the faith and re- "sources of said city for the ultimate redemption of the "same, and for the payment of the interest thereon. "Such bonds shall not be disposed of by said commis- "sioners for less than their par value.

"SEC. 3. The city council of said city is hereby au- "thorized and required annually after being notified by "said commissioners of the issuance of such bonds to "levy and collect as other taxes are levied and collected, "and at the same time and in the same manner, not less "than six mills on each dollar of the assessed value of "the real and personal property in said city. The pro- "ceeds of such tax to be paid over by the collector of "said city to the treasurer thereof, and by him kept as a "separate fund subject to the order of said commissioners "for the payment of the interest on said bonds, and in "case of a surplus, the said commissioners shall invest "the same in bonds of the United States, or of the State "of Illinois for the ultimate redemption of such bonds.

"SEC. 4. The said commissioners may appoint a presi- "dent, and a secretary who shall be treasurer. The lat- "ter shall give bonds to said city, conditioned for the "faithful discharge of his duties, and they may also ap- "point a proxy to vote on said stock at any meeting of "the stockholders of said company, and instruct such "proxy in what manner to vote, but no vote shall be "given on said stock for either of such commissioners for "directors of said company.

"SEC. 5. Said commissioners may, at any time, dispose of such stock at not less than its par value, and any holder of any such bonds may, at any time, exchange the same for an equal amount of said stock. In case of a sale of said stock, or of any portion of the same, the said commissioners shall, if practicable, take up said bonds, and if not, shall invest the proceeds in bonds of the United States, or the State of Illinois. Said commissioners shall keep a record of their proceedings, and annually report to the city council their doings herein. Said commissioners shall be allowed all reasonable expenses, but no compensation for their services. In case of a vacancy in said board by death, resignation, refusal or neglect to act, or removal from the county of La Salle, the circuit court of said county shall fill such vacancy.

"Approved, February 19th, 1867."

Also by an act to amend an act entitled: "An act to charter the city of Ottawa, approved February 10th, 1853," as follows:

"Section 1, Chapter 2. When the bonds now held against the city of Ottawa shall become due, the city council of said city are hereby authorized to cause other bonds, for the same sum or sums, and on the same terms and for such time as the city council may deem proper, to be issued and delivered to the holder of said bonds now held against said city. And the city council are hereby authorized, in addition to the taxes now authorized to be levied and collected by said city to levy and collect in the same manner and at the same time as other city taxes are levied and collected, a tax not exceeding two mills on each dollar of the assessed value of the real and personal property in said city, said tax, when collected, to

"be paid to the city treasurer, and by him to be kept "as a separate fund to pay off the bonds so held against "said city. Said separate funds may be invested in bonds "of the United States or of this State.

"Approved March 5th, 1867."

THIRD. That on or about the first day of July, A. D. 1867, the commissioners appointed by the said act of February 19th, A. D. 1867, viz: William Reddick, Milton H. Swift, Jeremiah Wood, George Avery and Richard Thorne met, and duly organized as such Board of Commissioners, by electing Milton H. Swift president and John F Nash secretary of said Board of Commissioners.

That after the organization of said Board of Commissioners, and prior to the 15th day of June, A. D. 1869, the city council took steps to secure a subscription by the said Board of Commissioners to the capital stock of said Ottawa Manufacturing Company, and to secure shares of its stock therefor, under said act of February 19th, 1867, but said Board of Commissioners failed to make such subscriptions, and to procure such stock in that behalf.

FOURTH. That on the 15th day of February, 1851, the legislature of the State of Illinois passed an act entitled "An Act to authorize certain persons to construct a dam "across Fox river for hydraulic and manufacturing pur- "poses," which act was as follows:

"*Be it enacted by the People of the State of Illinois, repre- "sented in the General Assembly:*

"SEC. 1. That William H. W. Cushman, George E. "Walker, John V. A. Hoes, George H. Norris, Lorenzo "Leland and Henry G. Cotton, or such of them, or such "other persons as may choose to associate with them, by "subscribing to the stock of the company as hereinafter au- "thorized, are hereby created a body corporate and politic

" by the name of the "Ottawa Manufacturing Company," " and by that name shall have perpetual succession, and be " capable of contracting and being contracted with, of " suing and being sued, of acquiring either by purchase or " under the provisions of this act, as hereinafter authorized, " and of holding real estate and personal property, for the " purposes contemplated and authorized by this act, or in " discharge of debts due the said corporation, and of using " and disposing of the same; may have a common seal, " which they may alter at pleasure, and may make all " needful by-laws for the government of the company, its " officers, and the management of its affairs, and alter the " same at pleasure; may appoint or provide for the election " of such officers and agents as may be deemed necessary, " and prescribe the duties and liabilities of all the officers of " said company.

" SEC. 2. The said company, when formed, are hereby " authorized to build a dam across Fox river, on section " 11 or 12, in Township 33, North of Range 3, East, in " LaSalle county, for the purpose of creating a water- " power, and the said company may use, lease or other- " wise dispose of the same, and may construct such other " works, buildings and machinery as may be deemed " necessary or proper to use such water, and to promote " the interests and objects of the company.

" SEC. 3. The said company, having first obtained the " assent of the corporate authorities of the town of Ot- " tawa, may use any of the streets, alleys or public " grounds in the said town for the purpose of creating " such power, or of using or applying the same, as herein " provided and authorized.

" SEC. 4. The capital stock of said company shall not

" exceed $50,000, which shall be divided into shares of
" one hundred dollars each.

" SEC. 5. The persons named in the first section of
" this act, or a majority of them, or of the survivors of
" them, if any shall die, may cause books of subscription
" to the capital stock of said company to be opened at
" some public place, after having given notice of the same
" for at least thirty days, by publication in some newspaper
" printed in said county. Any person may become a
" stockholder in said company, by subscribing at least
" one share and paying for the same, and all assessments
" thereon, when called for. Each share shall be entitled
" to one vote in all proceedings or elections of said com-
" pany, which may be given in person or by proxy.

" SEC. 6. After five thousand dollars of the stock of
" said company shall be subscribed, and ten per cent.
" thereon paid in, an election may be held for not less
" than three, nor more than seven directors, of which the
" same notice shall be given as required in section 5; at
" the same time and place such articles of association and
" by-laws as may be deemed best for the government of
" the company and its officers, and the management of its
" affairs, may be adopted.

" SEC. 7. The directors shall hold their offices for one
" year, and until their successors are chosen, which may
" be provided for in the articles of association, or by-laws
" of said company. The directors shall have the man-
" agement of all the business of said corporation, the ap-
" plication of its funds, the disposition of its property, and
" shall make all contracts and conveyances; all of which,
" however, shall be in accordance with the articles of
" association and by-laws of said corporation.

"SEC. 8. The said corporation, for the purposes here-
"in expressed and authorized, may enter upon and take or
"flow any real estate deemed necessary, provided that the
"said company shall pay the value of such real estate and
"damage done by flowing or injuring lots or lands by the
"erection of the said dam, or any of the works of the com-
"pany.

"For the purpose of ascertaining the value of such real
"estate, or the amount of such damage, the said company
"may apply by petition to the circuit or county court of
"said county, in which petition shall be set forth the
"point, as near as may be, at which the said company pro-
"pose to build the said dam, or at which the same is built,
"and the height to which they propose to erect, or have
"erected the same above low or the ordinary stage of
"water in said river, the property, particularly describing
"it, taken or proposed to be taken for the purposes here-
"in authorized, or to be flowed, occupied or injured by the
"works of said company. Notice shall be given of the
"filing of such petition, or of the intention so to do, per-
"sonally to the owners, if known, and by publication in at
"least two newspapers in said county, once in each week
"for six weeks, stating in said notice the facts required to
"be set forth in the petition, the last of which publications
"shall be at least sixty days prior to the day on which
"said petition was heard or acted upon by said court.
"Any person owning or having an interest in such real
"estate, or any part thereof, may upon application and by
"filing in court a statement of such ownership or interest,
"verified by his or her affidavit, be heard in such pro-
"ceedings. Upon the hearing of such petition the said
"court shall appoint five commissioners, who shall be dis-
"interested, and who shall take an oath faithfully to dis-

"charge the duties of their office, any three of whom "shall be competent to act. The said commissioners or a "majority of them, shall at such time and place as the said "court may direct, proceed to examine and estimate the "value of such real estate, as is proposed to be taken, and "the injury which may be done by the said dam or works "of the said company to the real estate flowed, "or to be flowed, or injured thereby. The said "commissioners may administer oaths and hear any "evidence offered, and may personally inspect the "property, and in estimating the damages shall "consider the benefits to result from the works of said "company. The commissioners shall report to said court, "stating the value of such real estate, and the damages, "setting forth the value of all damages to each parcel of "real estate separately: the said court upon receiving such "report shall make an order condemning such real estate "to the use of said company or its works, and the com-"pany shall thereupon, on demand, pay to the persons "legally entitled thereto, the amount so ascertained, pro-"vided the said court may, for good cause shown, order "re-assessment of the value or damages of such real es-"tate or any portion thereof: the said company shall also "pay all the costs of the proceedings.

"SEC. 9. Any person owning lands taken, flowed or "injured, may in like manner, apply to said court to have "the value of the same, or the injury thereto ascertained, "but no other or further proceedings shall be had against "said company.

"SEC. 10. This act shall be considered a public act. "Approved, February 15th, 1851."

FIFTH. That on the sixteenth day of February A. D. 1865, the legislature of the State of Illinois passed an-

other act entitled "An act to amend an act, entitled "'an act to authorize certain persons to construct a "dam across Fox river, for hydraulic and manufacturing "purposes,' approved February 15th, 1851," which said act is as follows:

"*Be it enacted by the People of the State of Illinois, repre-*
"*sented in General Assembly:*

"Sec. 1. That the said company shall have in addi-"tion to the powers granted in and by said act, to which "this is an amendment, the right for all of the pur-"poses mentioned in the said act, to build a dam across "the Illinois river at such point as the said company may "elect, and also the right to construct a race or races for "the purpose of introducing the water of the Illinois "river into the pool of the dam authorized to be erected "across Fox river, and for any or all the purposes con-"templated by this act, and by the act to which this is an "amendment, may take and use such portion of any high-"way, street, alley, or public ground as may be deemed "necessary.

"Sec. 2. Section 9 of the act to which this is an "amendment is hereby amended by adding at the end of "the same the following: 'Provided that no action or "other proceeding shall be had against said company on "account of the erection of said dam, race or races, unless "within one year after the erection or construction of the "same or any or either of them.'

"Sec. 3. The 4th section of said act to which this is "an amendment shall read as follows: 'The capital "stock of said company may be fixed by the same, and "divided into shares and may be increased or dimin-"ished.'

"Sec. 4. The name of 'Henry G. Cotton,' in the first

"section of said original act, is stricken out, and the "names of 'Dwight Cameron,' and 'John F. Nash,' are "hereby inserted in its stead.

"Approved February 16th, 1865."

SIXTH. That on the 15th day of June, 1869, the city of Ottawa adopted the following ordinances:

First. "An ordinance to provide for a loan for municipal purposes.

"SEC. 1. Be it ordained by the city council of the "city of Ottawa that the mayor of the city be and he is "hereby authorized to borrow in the name of the city, at "a rate of interest not exceeding 10 per cent., the sum of "$60,000, for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued "therefor in the sum of $500.00, with interest payable "annually, said bonds to be payable one-third in five "years, one-third in 10 years, and one-third in 15 years "after the date thereof, provided that no application shall "be made of the proceeds of said bonds, except for the "purpose aforesaid, and in pursuance of an ordinance to "be passed for that purpose by the city council, nor until "the faithful application of the proceeds of such bonds to "the purpose aforesaid shall be fully secured to the city.

"SEC. 2. Be it ordained that a sufficient sum to pay the "interest on said loan shall be annually provided by taxation, and set apart as a separate fund, and to be applied "to the payment of the interest on said bonds, and for no "other purpose.

"SEC. 3. This ordinance shall be submitted to the "voters of the city to be voted for or against at an election to be held for that purpose on the 20th day of July, "1869. The matter of the determination shall be by de-

"positing ballots upon which shall be written or printed "'For the loan ordinance' or 'Against the loan ordi- "nance.'"

Second. On the 30th day of July, 1869, an ordinance to carry into effect the ordinance of June 15, 1869, entitled "An ordinance to provide for a loan for municipal pur- "poses," as follows:

"WHEREAS, by an ordinance passed by the city council "on the 15th of June, 1869, it was provided that the "mayor of the city should be authorized to borrow in "the name of the city $60,000, to be expended in devel- "oping the natural advantages of the city for manufac- "turing purposes, and to issue the bonds of the city "therefor; and whereas, it was provided by said ordi- "nance that the same shall be submitted to the voters of "the city to be voted for or against, at an election to be "holden for that purpose on the 20th day of July, 1869; "and whereas, at said election, the said ordinance was "ratified by the voters of the city by a majority of 823 "votes, being a majority of the legal voters of the city:

"NOW, THEREFORE, be it ordained by the city council "of the city of Ottawa, that the bonds of the city for the "sum of $60,000, be issued by the mayor in accordance "with the terms and conditions of said ordinance of June "15th, 1869, and that he deliver the same to William "H. W. Cushman, to be used by him in developing the "natural resources and surroundings of the city, and that "the said Cushman is authorized and directed to expend "the same in the improvement of the water-power upon "the Illinois and Fox rivers within the city and in the "immediate vicinity thereof, under the franchises and "powers which have been granted for that purpose by "the legislature of the State, or which may hereafter be

" granted for that purpose in the manner which in his " judgment shall best secure the practical and permanent " use of said water-power in the city and its immediate " vicinity: provided, that said Cushman shall execute " and deliver to the mayor an agreement from him to the " city of Ottawa that he will, without unreasonable or un- " necessary delay, cause a good, substantial, and sufficient " dam to be constructed across the Illinois river above the " city, to bring into use all the available water power of " said river at Ottawa, and will construct sufficient head " and tail races to make such water power available; said " races to be constructed and continued to the Fox river " below the aqueduct and above the island in Fox river, " as fast as the same may be required for actual use, and " as fast as said water power can be leased at fair and " reasonable rates, and be brought into actual operation, " and that he will also erect a good, substantial and suffi- " cient dam across Fox river so as to make available the " water power of both rivers at Ottawa, as soon as the " additional water power created by such dam across Fox " river can be brought into actual use by being leased at " reasonable and fair rates, so as to have all of the availa- " ble water power of both rivers at Ottawa ready for use " as rapidly as called for. And provided, also, that said " Cushman shall bind himself that if said work is not con- " structed as aforesaid, that he will return said bonds to " the city, or the value of the same, and save it harmless " from all loss on account of the same, or on account of " interest accruing thereon, and in case said work shall " not be completed by said Cushman, then to return the " *pro rata* share of said bonds in the proportion that the " cost of the work constructed shall bear to the part of " the work not constructed; provided that at least one of " the dams above mentioned, with the races necessary to

"make the water power thereby created available for "practical use shall be completed, or the whole of said "bonds shall be returned to the city by said Cushman.

"The intent of this ordinance being to secure the im- "provement and development of said water powers in this "city, by appropriating the loan obtained under the ordi- "nance aforesaid for that purpose, or *pro rata*, so far as "said water power shall be made available for practical "use."

That under said ordinance of June 15th, an election was held, and a majority of the voters of Ottawa voted in favor of issuing said bonds.

In addition to the foregoing ordinances the following proceedings of the city council of the city of Ottawa, in relation to said bonds, were had, and the agreement with said Cushman, as appears from the records of said city council. On the 14th day of June, 1870, at a regular meeting of said city council, * * * * "on "motion of Fiske, ordered that a committee consisting of "the mayor and three aldermen be appointed to wait on "W. H. W. Cushman, and ascertain from him positively "and definitely at what time he proposed to commence the "work of the improvement of the water power in the vi- "cinity of Ottawa, as per contract between him and the "city of Ottawa."

July 12, 1870, at a regular meeting of said council the special committee appointed to confer with W. H. W. Cushman in relation to the contract between him and the city of Ottawa, in the matter of the improvement of the water power in the vicinity of Ottawa, reported that "the committee had waited on Mr. Cushman, and from him had received the positive assurance that the stakes were now stuck; that all the arrangements for the prosecution

of the work are now perfected, and that before one year from this date the water would be pouring over the dam, contracted to be constructed across the Illinois river."

And also the following proceedings of the city council of the city of Ottawa, in relation to said bonds, viz:

"Tuesday, May 11, 1869. Regular meeting; present, "Mayor Shuler and aldermen Fiske, Thomas, Freeman, "Brunker, Hughes, Leonard, Clifford, Colwell, Osman, "Burke, Bosserman, Moore and Calkins. * * * * "Colwell submitted the following resolution, which was, "on motion of Calkins, adopted:

"*Resolved*, That the commissioners appointed to take "stock for the city of Ottawa, to the amount of $100,000, "in the Ottawa Manufacturing Company, be requested to "take such stock in the corporation created by the act "entitled 'An Act to incorporate The Ottawa Manufac- "turing Company, and to authorize said company to build "a dam across the Illinois river, and to use the water "power thereby created.' Approved Feb'y., 1851, "which was revived and amended by a supplementary "act approved Feb'y. 16, 1865.

"Provided said corporation will organize and open its "books for subscriptions immediately; and, provided fur- "ther, that it will commence improving the water power "at the earliest moment practicable.

"On motion of Colwell, ordered that a committee of "three be appointed to confer with the Ottawa Manufac- "turing Company in relation to the provisions as in resolu- "tion directing commissioners to take stock for the city of "Ottawa, to the amount of $100,000, in said company.

"Mayor Shuler appointed Colwell, Osman and Fiske "said committee."

SEVENTH. That the bonds set out in the declaration were issued according to their date and face, as set forth in the declaration, and delivered to William H. W. Cushman, on the 2d day of August, 1869, under the following agreement:

"THIS AGREEMENT, made this second day of August, A. "D. 1869, between William H. W. Cushman, of Ottawa, "Illinois, party of the first part, and the city of Ottawa, in "the county of LaSalle, Illinois, party of the second part, "witnesseth, that whereas, the said Cushman has received "from the city of Ottawa, aforesaid, the bonds of the city, "to the amount of sixty thousand dollars, to be used in "developing the natural resources of the city for manu- "facturing purposes, and to be expended in the improve- "ment of the water power upon the Illinois and Fox "rivers, within the city and in the immediate vicinity "thereof, said bonds having been issued by said city in "pursuance of an ordinance passed by the city council of "said city on the 15th day of June, 1869, entitled 'An "Ordinance to provide for a loan for municipal purposes,' "which was ratified by the voters of the city on the 20th "day of July, 1869, and of an ordinance passed by the city "council of said city on the 30th day of July, A. D. 1869, "entitled 'An Ordinance to carry into effect the ordinance "of June 15th, 1869, entitled, 'An Ordinance to provide "for a loan for municipal purposes.'"

"NOW, THEREFORE, in consideration of the premises, "the said William H. W. Cushman, for himself, his heirs, "executors and administrators, doth by these presents "covenant and agree to and with the city of Ottawa, "aforesaid, that he will, without unreasonable or unneces- "sary delay, cause a good and substantial dam to be con- "structed across the Illinois river, above the city, suf-

"ficient to bring into use all the available water power of "said river at Ottawa, and will construct sufficient head "and tail races to make such water power available, said "races to be constructed and continued in Fox river be- "low the aqueduct and above the island, as fast as the "same may be required for actual use, and as fast as the "water power can be leased at fair and reasonable rates, "and that he will also construct a good, substantial and "sufficient dam across the Fox river, below the aqueduct, "whenever the same shall be necessary to make available "the water power of both rivers at Ottawa, and be nec- "essary for the use of said water power, and whenever "the said water power made available by the construc- "tion of said dam across Fox river can be leased at fair "and reasonable rates, so as to have all of the available "water power of both rivers at Ottawa ready for use as "rapidly as called for, and said Cushman also binds him- "self, his heirs, executors and administrators, to and with "said city, that in case said work is not performed to the "extent of constructing a dam across the Illinois river, "and races to make water power thereby created avail- "able for practical use, that he will return said bonds, or "the value thereof to the city, and save and keep harmless "the said city from all loss on account of the same, or on "account of the interest accruing thereon, and in case the "work shall be performed to the extent above indicated, "but shall not be completed by the construction of all the "dams and races heretofore specified, then said Cushman "shall return to said city a *pro rata* share of said bonds "or the value thereof, in proportion that the cost of the "work constructed shall bear to the cost of that part of "the work not constructed. The said Cushman to be ex- "onerated from all liability of any kind to the city or on

"account of said bonds, when he shall have performed "the agreements herein expressed to be performed by "him at the time stipulated for the performance of the "same, the bonds being appropriated by the city to se- "cure the completion of said work, and without other con- "sideration than the public benefit resulting to the city "thereby; and it is hereby agreed that nothing in this con- "tract, nor in the ordinances therein referred to shall give "to said city any right, title, interest or ownership, whether "in law or in equity in the said improvements when com- "pleted, according to the conditions and stipulations herein "contained.

"IN WITNESS WHEREOF, the said William H. W. Cush- "man set his hand and seal the day and year above written.

"WILL H. W. CUSHMAN."

And said city of Ottawa received no stock in said manufacturing company, or other consideration for said bonds, other than the said contract with said Cushman hereinbefore set out, but the same was issued as a donation by the city of Ottawa to said Cushman, to be applied by said Cushman individually, or under such franchises as were or might be granted for the purpose of making said improvement, and the same were issued and delivered by the mayor and clerk of said city of Ottawa, and not by the commissioners created by said act of the legislature, and without being placed in the hands of the commissioners aforesaid, appointed under the above recited act, approved March 19th, 1867, and were issued and delivered to said Cushman, and there was no consent of said commissioners to the issue of said bonds, and said commissioners took no part in the issue of said bonds.

EIGHTH. That no money whatever was borrowed by the mayor of the city of Ottawa under and by virtue of the said

ordinances of the city of Ottawa, passed June 15th, 1869, and July 30th, 1869, but said bonds of the city of Ottawa were, on the 2d day of August, A. D. 1869, executed and delivered to the said Wm. H. W. Cushman, by said mayor, as a donation to aid in securing the contemplated water power in the city and its immediate vicinity, as hereinbefore set forth.

NINTH. That on the eleventh day of March, A. D. 1871, the said Wm. H. W. Cushman delivered the said bonds to the said Ottawa Manufacturing Company, to be used by the said company for the purpose of making the improvement hereinbefore mentioned, and without further consideration and without his endorsement thereon, said Cushman being at the time a director in said Ottawa Manufacturing Company.

TENTH. That said Ottawa Manufacturing Company at once entered upon the work of constructing the dams and races, and partially constructed the same under the powers granted to it as above set forth, and completed said work so that some water power was created, but that said dam was carried away by a freshet in 1872 or 1873, and has never been reconstructed.

ELEVENTH. That on the 13th day of April, A.D. 1871, the plaintiff purchased the bonds in suit for their face value, at Portsmouth, in the State of New Hampshire, without any endorsement whatever, and the city, defendant, paid the interest on the bonds due August 2d, 1870, and 1871.

TWELFTH. That the plaintiff in this cause took said bonds without any endorsement thereon, but without notice of any of the defenses set up in this cause.

THIRTEENTH. And when said bonds were read in evi-

dence, they were objected to by the defendant, because they had not been endorsed by the payee therein named, but the court admitted the same, and the defendant excepted thereto.

Upon the finding of the foregoing facts, the court finds the issue for the plaintiff, and finds the debt $4,800, and the damages $808.82, for which the court renders judgment for the plaintiff, to which finding of the issue and judgment, the defendant at the time excepted, and the court orders the foregoing findings to be made a part of the record.

H. W. BLODGETT,

Judge.

This certificate is correct.

NICHOLSON & MALONEY,

G. S. ELDRIDGE.

(Endorsed).

Filed July 15th, 1881.

WM. H. BRADLEY,

Clerk.

ERRORS ASSIGNED.

I. The court erred in finding the issue for the plaintiff.

II. The court erred in not finding the issue in favor of the defendant.

III. The court erred in receiving in evidence the bonds sued upon, without an endorsement by the payee therein named.

IV. The court erred in rendering judgment in favor of the plaintiff, in manner and form aforesaid.

V. The court erred in not rendering judgment in favor of the defendant.

VI. General assignment.

BRIEF.

We submit the case on the three following propositions, and respectfully request the court to read our argument under these propositions, as printed in the case of *City of Ottawa* v. *Carey*, heard below, and brought here at the same time with this case.

I.

THE BONDS IN QUESTION, ISSUED BY A CORPORATION CREATED BY THE LEGISLATURE OF ILLINOIS, AND POSSESSED OF NO AUTHORITY TO ACT EXCEPT AS GIVEN BY THE LEGISLATURE, CAN BE ASSIGNED ONLY ACCORDING TO THE LAWS OF ILLINOIS, AND THESE LAWS, AS EXPOUNDED BY THE SUPREME COURT OF THE STATE, HAVE ALWAYS REQUIRED AN ASSIGNMENT BY ENDORSEMENT, IN ORDER TO VEST IN THE ASSIGNEE THE LEGAL TITLE.

AUTHORITIES.

Garzin v. *Wiswell*, 83 Ill., 218.
New Hope Delaware Bridge Co. v. *Perry*, 11 Ill., 467.
Johnson v. *County of Stark*, 24 Ill., 75.
Supervisors v. *Hubbard*, 45 Ill., 139.
Town of Eagle v. *Kohn*, 84 Ill., 292.
Turner v. *P. & S. R. R. Co.*, 95 Ill., 143.
Nesmith v. *Sheldon*, 7 How., 817.
Jefferson Bank v. *Skelly*, 1 Black, 443.
Leffingwell v. *Warren*, 2 Black, 603.
U. S. Bank v. *Donnally*, 8 Pet., 372.
Parsons on Notes and Bills, Vol. II, 355.
Trimbey v. *Vignier*, 1 Bing., N. C., 151.

II.

IF THE PURPOSE FOR WHICH THESE BONDS WERE ISSUED CAN BE CONSIDERED A CORPORATE PURPOSE, THE BONDS, IN ORDER TO BE VALID, SHOULD HAVE BEEN ISSUED BY AUTHORITY OF THE BOARD OF COMMISSIONERS SPECIALLY APPOINTED BY THE LEGISLATURE TO TAKE CHARGE OF THIS WHOLE MATTER — TO SUBSCRIBE THE STOCK, AND TO ISSUE AND SELL, AT PAR, THE BONDS OF THE CITY TO RAISE THE MONEY FOR ITS PAYMENT.

AUTHORITIES.

Town of South Ottawa v. *Perkins*, 4 Otto, 269.

Township of East Oakland v. *Skinner*, 4 Otto, 258.

Middleport v. *Ætna Life Ins. Co.*, 82 Ill., 562.

Supervisors v. *People ex rel. R. R. Co.*, 25 Ill., 181.

Gaddis v. *Richland Co.*, 92 Ill., 119.

Brush v. *Ware*, 15 Pet., 93.

McClure v. *Oxford*, 4 Otto, 432.

III.

THE JUDGMENT OF THE CIRCUIT COURT WAS ERRONEOUSLY RENDERED, BECAUSE THAT COURT WAS WITHOUT JURISDICTION TO RENDER ANY JUDGMENT ON THE MERITS.

AUTHORITIES.

Parsons on Notes and Bills, Vol. II. Chap. 2, p. 35.
Dillon on Municipal Corporations, § 404.
Ex parte Watkins, 3 Pet., 205.
Rhode Island v. *Mass.*, 12 Pet., 718.
Scott v. *Sandford*, 19 How., 393.

Supposing that this course will be more agreeable to Your Honors than would a reprint of our argument in the Cary case, or a rediscussion of the same points, we respectfully submit this cause upon the portions of the Cary case contained in the first, third and sixth propositions there advanced.

LAWRENCE, CAMPBELL & LAWRENCE, AND
M. T. MALONEY,
For Plaintiff in Error.

C. B. LAWRENCE,
Of Counsel.

IN THE

UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1881.

CITY OF OTTAWA, *Plaintiff in Error,* vs. BANK OF PORTSMOUTH, *Defendant in Error.*	Error to Circuit Court, Northern District of Illinois.

PETITION FOR REHEARING.

LAWRENCE, CAMPBELL & LAWRENCE,
For Plaintiff in Error.

C. B. LAWRENCE,
Of Counsel.

BEACH, BARNARD & CO., PRINTERS, 104 RANDOLPH ST., CHICAGO.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1881.

CITY OF OTTAWA,
Plaintiff in Error
vs.
BANK OF PORTSMOUTH,
Defendant in Error.

Error to Circuit Court, Northern District of Illinois.

PETITION FOR RE-HEARING.

The counsel for plaintiff in error in the above entitled cause, requests the court to order a re-argument in said case upon the grounds below stated.

We have not yet seen the text of the opinion in full, but as we understand so much of the opinion as has been published in a Chicago newspaper, the decision proceeds upon the ground that a bond of the city of Ottawa, payable to bearer simply, and not to A B, or bearer, although not negotiable by delivery under the laws of Illinois, may yet be negotiable by delivery and without endorsement, if payable in the State of New York, upon the ground that the law of the place of payment controls this question.

We do not ask the court to reconsider this position as a general proposition, although we had supposed the law to be otherwise. But the decision in this particular case has been arrived at without its having been pointed out to the court that, by the repeated decisions of the Supreme court of the State of Illinois, a bond issued by a municipal corporation, whether county or town, can be made payable only at the treasury of such county or town, in the absence of an express provision of the legislature authorizing them to be made payable elsewhere.

It is not pretended that the city of Ottawa had such express authority.

If the decisions of the State court are to control, in reference to the powers of Illinois municipal corporations, it necessarily follows from their decisions upon this question, that the clause in the bond under consideration, making them payable in the city of New York, is simply void, or, in the language of our Supreme court, mere surplusage, and being so, of course it follows that this language cannot communicate to the bonds a quality of negotiability, which they did not possess in the absence of this clause.

If the town had no power to insert this clause, as held by our courts the bonds must be read as if the clause were not contained in them.

In view of these cases, we respectfully submit that the decision of the court in the case at bar has no foundation upon which to rest. If the bonds are negotiable solely by virtue of their being made payable in the city of New York, and such, we understand to be the decision of the court, when it is made to appear to the court that this clause has, under the decisions of the Supreme court

of Illinois, no force or effect, and is to be regarded as surplusage in the bond, it would seem that its decision must be reconsidered by the court.

We quote the Illinois decisions, as follows:

In the case of *The People* v. *County of Tazewell*, 22 Ill., 151, the court used the following language:

"This court held in the case of *Prettyman* v. *The Board* "*of Supervisors of Tazewell County*, 19 Ill. R., 406, that "it was only by virtue of the act of February, 1857, au- "thorizing the county courts of each county which had "subscribed to the Tonica and Petersburg road, to make "the interest of their bonds payable at any place they "might choose. That act only applied to subscriptions to "that particular road, and can have no application to any "other. And it was there held, that the County court "had no power to issue bonds payable in the city of New "York, for want of express authority by legislative enact- "ment. States, counties and corporations, created for pub- "lic convenience only, are not required to seek their cred- "itors to discharge their indebtedness, but when payment "is desired, the demand should be made at their treasury. "That is the only place at which payment can be legally "insisted upon, and it is the only place where the treas- "urer can legally have the public funds with which he is "entrusted. To authorize the auditor to draw his war- "rants on the treasurer, payable in a sister State or in a "foreign country, necessarily imposes an obligation on the "treasurer to provide funds at that place to meet them. "And his duties requiring him at the treasury, would re- "quire the employment of agents, the transmission of the "funds at a risk of loss, and at a considerable expense, in "charges, insurance and discounts, which are not incident

"to its payment at the treasury. And the same reasons "apply with equal force to cities, counties and public cor- "porations, of a similar character. The legislature has "conferred no such general power on such bodies, and in "its absence they have no power to make their indebted- "ness payable at any other place than at their treasury."

Also, in *Johnson* v. *County of Stark*, 24 Ills., 91 as follows: "It was held by this court, in the case of *The* "*People ex rel.* v. *Tazewell County*, 22 Ill., 147, that "counties and municipal corporations, unless specially au- "thorized by legislative enactment, have no power to "make their indebtedness payable at any other place than "at their treasury. That proceeding was an application "for a writ of mandamus, to compel the board of super- "visors to issue bonds and coupons, payable in the city "of New York. * * * * * "This case presents the question, whether instruments, "evidencing their indebtedness payable specifically at "any other place, are void, or whether they may be up- "held as payable at their treasury. This coupon, on its "face purports to be payable at the city of New York. "The doctrine is well recognized, that in exercising a "power, all acts performed in excess of, or beyond the "power delegated, must be rejected as unwarranted; and "if, after their rejection, there has been enough done to "show a proper execution of the power, the act will be "sustained, irrespective of the acts beyond the power "delegated. But, on the contrary, if the acts performed "beyond the authority conferred, are so inseparably con- "nected with the acts properly performed, that by their "rejection, the power remains unexecuted, then the whole "transaction must be rejected as void. When tested by "this rule, it will be perceived that this coupon may be

"sustained as valid, and payable at the treasury of the "county. The law authorized the county to issue it, "and requires no place of payment to be named. And "where none is specified, it, by operation of law, is pay- "able at the treasury. If this coupon had not contained "the language 'at the city of New York,' it would have "been a legal instrument, strictly conforming to all the "requirements of the law authorizing counties to issue "evidences of indebtedness. If, then, this unauthorized "portion of the coupon were rejected, it would be in con- "formity to the law, and for the purpose of upholding it, "the law will reject that portion, as surplusage. This "doctrine was announced by the very able district judge "of United States District court for Wisconsin in the "case of *Mygatt* v. *The City of Green Bay*, which was "precisely similar to this case."

Also, in *City of Pekin* v. *Reynolds*, 31 Ill., 531, the court say: "It was held, in the case of *The People* v. "*Tazewell County*, 22 Ill., 147, that municipal corporations "could not even bind themselves to pay their indebted- "ness at any other place than at their treasury, unless "specially authorized by legislative enactment. That "their debts were payable at the treasury of the body. "The same rule was adhered to in the case of *Johnson* "v. *Stark County*, 24 Ill., 75. And we see no reason for "overruling or modifying the rule."

Also, in *Sherlock* v. *Village of Winnetka*, 68 Ill., 535, as follows: "The objection that the bonds are illegally "made payable at a bank in Chicago, does not invalidate "them, as was held in the case of *Johnson* v. *Stark* "*County*, 24 Ill., 75. The agreement to pay at that place is "void, but the balance of the coupons and bond are not

"rendered invalid for that reason. In paying the in-
"terest the treasurer should not obey that agreement in
"the bond, but pay it at the village treasury."

In view of the above authorities, we respectfully ask the court to order a re-argument of the above entitled cause.

LAWRENCE, CAMPBELL & LAWRENCE.

IN THE

UNITED STATES SUPREME COUR

OCTOBER TERM, A. D. 1881

THE CITY OF OTTAWA, *Plaintiff in Error*,

v

THE FIRST NATIONAL BANK OF PORTSMOUTH, *Defendant in Erro*

BRIEF ON PART OF DEFENDANT IN ERR

G. S. ELDREDGE,

For Defendant in Error.

CHICAGO.
TUCKER, NEWELL & CO., PRINTERS, 104 AND 106 MADISON STREET.
1881.

IN THE

United States Supreme Court.

OCTOBER TERM, A. D. 1881.

THE CITY OF OTTAWA,
Plaintiff in Error,
v.
THE FIRST NATIONAL BANK OF PORTSMOUTH,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON PART OF DEFENDANT IN ERROR.

STATEMENT.

On the 20th of August, A. D. 1869, the city of Ottawa issued one hundred and twenty bonds of $500 each, with interest coupons annexed, and this suit was brought, originally, by the defendant in error, against the City of Ottawa, to recover upon eight of said bonds with interest coupons attached to each bond. A copy of one of the bonds and of one of the coupons is made a part of the declaration and set

out in *hæc verba*, and appears on page [illegible] of the record. The bonds in question contain the following recitals:

"This is one of a series of one hundred and twenty bonds "of like amount and even date herewith, numbered one to one "hundred and twenty respectively, issued by the city of Ot- "tawa *by virtue of the charter of said city, wherein it is pro- "vided that the City Council shall have power to borrow money "on the credit of the city and to issue bonds therefor, provided "that no sum or sums shall be borrowed at a greater rate of "interest than ten per cent. per annum. Art. 5, sec. 3.* No "money shall be borrowed by the city until the ordinance "passed therefor shall be submitted to and voted for by a "majority of the voters of said city attending an election for "that purpose. Art. 10, sec. 20. And also in accordance "with a certain ordinance passed by the City Council of said "city on the 15th day of June, A. D. 1869, entitled '*An "ordinance to provide for a loan for municipal purposes*,' "which was ratified by a *majority* of all the qualified voters "of said city, at an election holden on the 20th day of July, "1869, and in conformity with an ordinance passed by the City "Council of said city on the 30th day of July, 1869, entitled, "An ordinance to *carry into effect* the ordinance of June 15, "1869, *entitled*, '*An ordinance to provide for a loan for "municipal purposes*.'"

The plaintiff alleges that on the 1st of August, 1870, he became the purchaser of the bonds, with the interest coupons annexed, at the City of New York, and for a valuable consideration; the non-payment of the bonds and coupons, and the refusal of the defendant to pay the same.

To this declaration the defendant in the court below (plaintiff in error) filed the plea of *nil debit* and the plea of *non est factum* sworn to, and numerous other special pleas. It was stipulated between the parties that all the pleas, with the exception of the first two, should be withdrawn, and the matters set forth in the numerous other pleas should be admissible in evidence under the first two pleas, so far as such matters should be competent evidence in the case, with a like effect in all respects, as if such matters had been specially pleaded.

A stipulation in writing was signed by counsel for the respective parties waiving a trial by a jury and submitting the matters in controversy to trial by the court without the intervention of a jury, and a finding had and judgment rendered in favor of the plaintiff for debt and damages, $5,698.82.

It will be observed by the findings of the court (see Record p. 26) that the court found that the plaintiff below was a *bona fide* purchaser of the bonds sued upon for value before maturity, and without notice or any real or alleged defense thereto.

The bonds sued upon in this case are a portion of the identical bonds from which the coupons were cut, which were sued upon in the case of *Hackett v. Ottawa*, tried before His Honor Judge Blodgett, and which was taken to this court and decided at the October term, A. D. 1878, and is reported in 99 U. S. p. 86, to which decision the court is respectfully referred, and which it is submitted is decisive of the pending case. There is, however, this additional point—if it be a point—worthy of consideration, viz.: That the bonds in ques-

tion were not endorsed by William H. W. Cushman, the payee named in the bonds, the bonds being, as will be observed, payable to William H. W. Cushman "OR TO THE BEARER HEREOF." This additional *point* is regarded as without any substantial foundation, but will be hereafter considered.

It is insisted on the part of the defendant in error that the decision in *Hackett v. Ottawa, supra*, is decisive of this case with respect to all the questions sought to be raised by the plaintiff in error, except the latter one, and that the decision by this court in *Roberts v. Bolles*, 101 U. S. 119, is conclusive on that point; and that therefore the judgment in court below in favor of the defendant in error must be affirmed, because (1) the plaintiff below, as found by the court, was a *bona fide* purchaser of the bonds and coupons for value before maturity, and, as held in *Hackett v. Ottawa, supra*, had the right to rely implicitly upon the recitals appearing upon the face of the bonds; and the city is estopped from denying that it had lawful authority to issue the bonds, or that the purposes for which they were issued were not corporate or municipal purposes and within the power conferred by its charter, namely: for a purpose deemed to be, and which was in fact, for the general benefit of the community, and fully authorized by the constitution of the State of Illinois, as repeatedly construed by the Supreme court of the State and by this court; and (2) that the question of the negotiability by delivery is conclusively settled by this court in *Roberts v. Bolles, supra*.

By the act of the legislature of Illinois, of February 10, 1853, incorporating the city of Ottawa; laws of 1853, p. 296, General power is given to the city "to borrow money on the

"credit of the city, 'and to issue bonds' therefor and 'to "'pledge the revenues of the city for the payment thereof;'" * * * "Provided, that no sum or sums of money shall be "borrowed at a greater interest than at 10 per cent. per "annum." (Sec. 3, Art. 5.)

Among the enumerated powers conferred by the charter, it is provided by section 4 of the same article that the city shall have power "to appropriate money and provide for the "payment of the debts and expenses of the city." Section 8 of the same article authorized the City Council "to provide "the city with water, to erect hydrants and pumps in the "streets for the convenience of the inhabitants."

By section 38 of the same article it is provided that "the City Council shall have power to make all ordinances "which shall be necessary and proper for carrying into execu-"tion the powers specified in this act, so that such ordinances "be not repugnant to or inconsistent with the constitution of "the United States, or this State."

The general power to borrow money conferred by section 3, of article 5, is coupled with this restriction only: "No "money shall be borrowed by the City Council until the ordi-"nance passed therefor shall be submitted to and voted for by "a majority of the voters of the said city attending an elec-"tion held for that purpose." Sec. 20, Art. 10.

The first and last sections above quoted are set forth *in hæc verba* upon the face of the bonds.

So regarding the decision in *Hackett v. Ottawa, supra*, as conclusive upon the question that the plaintiff in error is

stopped from asserting as against the defendant in error, that the bonds were not issued for a legitimate corporate purpose, it is, therefore, unnecessary to discuss this proposition in the pending case.

The only remaining question presented by the record, which it is deemed important to discuss is the one sought to be raised, viz., Whether the bonds were negotiable by delivering without endorsement.

It was supposed that the decision of this court in *Roberts v. Bolles*, 101 U. S. 119, following the early decision of the Supreme Court of this State, had put at rest all questions as to the negotiability of municipal bonds of the character of those involved in this case transferred by delivery simply.

(1.) The bonds in question were issued for the express purpose of circulation in all the money markets of the country where such securities are bought and sold, and without this general negotiable quality, they would have been practically valueless for the purpose for which they were designed; and not until the case of *Roberts v. Bolles* has any one in this court, it is believed, ever assumed to question the negotiability of such securities by delivery; and I am aware of no decision of the Supreme Court of Illinois sustaining such a proposition; although the proposition was discussed by counsel for the plaintiff in error with much apparent confidence in the court below, no decision of the Supreme Court of Illinois was cited to sustain it. It is true two or three cases were cited (which will hereafter be noticed), which it was assumed by counsel sustained that view, but an examination of the cases shows

very clearly that they fall far short of establishing such an extraordinary proposition. Were it not that it was presented with so much earnestness by the learned counsel for the plaintiff in error on the trial of this cause before the court below, I should hardly feel justified in discussing it here. The negotiability by delivery of municipal bonds payable to a person named, *or bearer*, or to a person named, "*or the bearer hereof*," has been so long acquiesced in by the courts of Illinois and by this court, as well as by the courts of all other States where the issue of such securities is authorized, that it may be justly said to be the common law of the country, and upon faith of which all such securities have for more than a quarter of a century been bought and sold; whereas divested of this negotiable feature, as before suggested, they would be practically valueless. When the city issued its bonds it authorized them to be placed upon the market for sale *generally in all the money centers and subject to the general commercial law of the country.*

(2.) That such was the purpose of the issue of thes bonds is too apparent to require argument, and is established conclusively from the fact that they are made payable at the city of New York, and their negotiability is controlled by the law merchant and common law, which at the time of the issue of the bonds was and ever since has been in force in New York, and in Illinois as well.

The R. S. of Illinois of 1848, Ch. 62, Title Laws, expressly provides that the common law of England so far as the same is applicable and of a general nature, and all acts of Parliament in aid of and to supply the defects of the common

law prior to the fourth year of James the First, excepting Ch. 6, 43 Eliz.; Ch. 8, 13 Eliz.; and Ch. 37, Henry VIII, "Shall be the rule of decision and shall be considered as of "*full* FORCE UNTIL REPEALED BY LEGISLATIVE AUTHORITY."

In *Cook v. Remmick*, 19 Ills. 598, in a very able and exhaustive opinion delivered by Ch. J. Caton, this statute was construed and it was expressly held that by virtue of it the *law merchant* was in force in Illinois. The learned judge says, p. 602: "The identical question which is presented in "this case was before the Supreme court of Indiana in the "case of *Piatt v. Eads*, 1 Blackford R. 81. The court there "said the whole current of authorities, from the commencement "of our system of jurisprudence down to the present day, goes "to establish the doctrine that the custom of merchants is and "always has been regarded as a part of the common law of "England.

"It is a law of a general nature, and not local to that "kingdom, and is there recognized by the courts as a part of "their system, from the circumstance of its universal applica- "tion and use in all commercial transactions throughout the "commercial world. Again, that court says: The *law* "*merchant*, then, being a part of the common law of England, "and being of a general nature, and not local to that kingdom, "is comprehended in that clause of the statute which adopts "the common law. Our legislature adopted the common law "in the same terms in which it had been previously adopted in "Indiana, and we agree with that court that we adopted that "portion of the common law which comprehends the *law* "*merchant*, and that by the common law as thus adopted by

"us, a bill of exchange payable on a given day does not "mature till three days after the day appointed on its face for "its payment."

This statute was re-enacted in the revision of the laws of Illinois of 1874, page 268, under the head of "*common law* "rule of decision." And as said by Justice Dickey, speaking of this statute in *Thompson v. Weller*, 85 Ill. 198, — it was enacted as early as 1818, and declared that the common law and the statutes of the British Parliament in amendment thereof, "shall be 'the rule of decision,' *until repealed by* "*legislative authority*," and, as said by the learned judge, constitutes a part of the "foundation of our system of juris-"prudence."

The rule of decision as defined by the court in *Cook v. Remmick*, *supra*, has never been departed from; and this statute adopting the law merchant has never been repealed or abrogated by "*legislative authority*," as said in *Thompson v. Weller*, *supra*, and is therefore the rule of decision which must control with respect to the negotiability of commercial instruments, except where it has been *expressly* changed by statutory enactments.

It cannot be abrogated by *judicial construction*, as is most emphatically indicated by the learned judge in the case last cited; and whatever decisions may have been made by the Supreme court prior to the case last cited, holding that there is an *implied* want of power, in the absence of specific statutory authority, to make a city bond payable elsewhere than at the treasury of the city, must be deemed to have been

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It cannot be abrogated by *judicial construction*, as is most emphatically indicated by the learned judge in the case last cited; and whatever decisions may have been made by the Supreme court prior to the case last cited, holding that there is an *implied* want of power, in the absence of specific statutory authority, to make a city bond payable elsewhere than at the treasury of the city, must be deemed to have been

inadvertently made, without due consideration of the statutory provision above referred to.

As before remarked, it is too apparent to admit of argument that it was the intention of the city to give the bonds *all* the qualities of negotiable paper so they might be bought and sold in any money market. Hence they were made payable in New York, in accordance with the universal custom recognized throughout the commercial community in this country, as *the place* of payment above all others to give commercial value to such securities, and thereby necessarily subjected these securities to all the conditions of the law merchant—the commercial law of the country. This is strictly a question of general commercial law which this court has often, and very recently, had occasion to pass upon.

In *Oates v. National Bank*, 100 U. S. 246, it is said that "while the Federal courts must regard the laws of the "several states * * * as rules of decision in trials at "common law in the courts in the United States in cases "where applicable, they are not bound by the decisions of "those courts upon questions of general commercial law. "Such is the established doctrine of this court so frequently "announced that we need only refer to a few of the leading "cases bearing upon the subject." (citing *Swift v. Tyson*, 16 Pet. 1 and other cases.)

Again, the court says in this case: "We have already seen "that the Statutes of Alabama, placed under the protection "of the commercial law promissory *notes payable in money "at a certain designated place; but how far the rights of "parties here are affected by the rules and doctrines of that*

"law is for the Federal courts to determine upon their own "judgment as to what these rules and doctrines are."

In *Railroad Company v. National Bank*, 102 U. S. 14, this court reviewed the authorities bearing upon this question, under the present statute, which is in substance a re enactment of section 34 of the original judiciary act, and reaffirm the doctrine of *Swift v. Tyson* and cases following, particularly, *Oates v. National Bank* (p. 28 to 32), and the opinion delivered concludes by saying: "To this doctrine, "which received the approval of all the members of this court "when first announced, we have, as our decisions show, "steadily adhered. We perceive no reason for its modification "in any degree whatever. We could not infringe upon it, in "this case, without disturbing or endangering that stability "which is essential to be maintained in the rules of a commer- "cial law. The decisions of the New York court, which we "are asked to follow in determining the rights of parties under "a contract there made, are not in exposition of any legislative "enactment of that State. They express the opinion of that "court, not as to the rights of parties under any law local to "that state, but as to their rights under the general commercial "law existing throughout the Union, except where it may have "been modified or changed by some local statute. It is a law "not peculiar to one state, or dependent upon local authority, "but one arising out of the usages of the commercial world. "Suppose a State court, in a case before it, should determine "what were the laws of war as applicable to that and similar "cases, the Federal courts, sitting in that state, possessing, it "may be conceded, equal power with the State court in the

"determination of such questions, must, upon the theory of "counsel for the plaintiff in error, accept the conclusions of "the State court as the true interpretation, for that locality, "of the laws of war, and as the 'law' of the State in the sense "of the statute which makes the 'laws of the states rules of "decision in trials at common law.' We apprehend, however, "that no one would go that far in asserting the binding force "of State decisions upon the courts of the United States, when "the latter are required, in the discharge of their judicial "functions, to consider questions of general law, arising in "suits to which their jurisdiction extends. To so hold would "be to defeat one of the objects for which those courts were "established, and introduce infinite confusion in their decisions "of such questions. Further elaboration would seem to be "unnecessary."

And in the separate opinion delivered by Justice Clifford (p. 57) the learned judge says: "State decisions, in respect "to titles to real estate and transfers of property, usually "furnish the rule of decision in the federal courts, by virtue "of the before mentioned provision of the judiciary act; but "the established practice is, that it does not apply, except in "matters of a strictly local character; that is to say, to the "positive statutes of the states, and in the interpretations of "the same by their own tribunals, including rights and titles "to things having a permanent locality, such as real property, "and that it does not extend to questions of general commer- "cial law, from which it follows, that where any controversy "arises as to the liability of a party to a bill of exchange, "promissory note, or other negotiable paper, in one of the

"federal courts, which is not determined by the positive words "of a State statute, or its meaning as construed by the state "courts, the federal courts will apply to its solution the general "principles of the *law merchant*, regardless of any local decision. " 1 Daniel, Neg. Inst., 2d ed., Sec. 10.

"Transactions of a commercial character extend throughout the civilized world, and it is well known that they are "chiefly conducted through the medium of bills of exchange "and other negotiable instruments. Uniformity of decision "in a matter of great public convenience and universal neces "sity, acknowledged by all commercial nations. Should this "court adopt a principle of decision which, when carried into "effect, would establish as many different rules for the deter "mination of commercial controversies as there are states in "the Union, it would be justly considered a public calamity, "as it must necessarily depreciate our negotiable securities in "all the foreign markets of the world, where our merchants "have commercial transactions.

"Stable and immutable rules are necessary to give confi"dence to those who received such securities in the usual "course of business. * * * Uniformity of decision in "such cases is highly desirable, and these observations are "sufficient to show that nothing is wanting to accomplish that "great object but the concurrence of a few more of the State "courts."

One or two more recent decisions of this court might be cited to the same effect, since published in the current law magazines (see *Chicago Legal News*, Jan. 22), which, as is

believed, have not appeared in the authorized reports of this court, to which the attention of the court is called.

It follows, therefore, that the bonds in question being payable in New York, their negotiable character must be determined by the law merchant.

(3.) As it was insisted in the court below, I suppose it will be again, that under the statute of Illinois with reference to negotiable instruments these bonds could not be negotiated without endorsement. This is simply a misapprehension.

Sections 3 and 4, chapter 73, R. S. of Illinois of 1845, entitled Laws and R. S. of 1874, p. 718, provides: § 3. "All "promissory notes, bonds, due bills and other instruments in "writing, made or to be made, by any person, *body politic* "*or corporate*, whereby such person promises or agrees to pay "any sum of money or articles of personal property, or any "sum of money in personal property, or acknowledges any "sum of money or article of personal property to be due to "any other person, shall be taken to be due and payable, and "the sum of money or article of personal property therein "mentioned shall, by virtue thereof, be due and payable as "therein expressed.

§ 4. "Any such note, bond, bill, or other instrument in "writing, made payable to any person named a payee therein, "shall be assignable, by indorsement thereon, under the hand "of such person, and of his assignees, in the same manner as "bills of exchange are, so as absolutely to transfer and vest "the property thereof in each and every assignee successively."

Notwithstanding this statute, which applies to all nego-

tiable instruments executed by any *body politic or corporate*, it was held by the Supreme court of Illinois, in *New Hope, etc. Bridge Co. v. Perry*, 11 Ills., as remarked by this court in *Roberts v. Bolles*, *supra*, that the statute *did not apply to bank notes*. Certainly bank notes fell within the letter of the statute, if it was intended to have the comprehensive application contended for on the other side, but the Supreme court of Illinois said it did not apply to such securities, but "*to instruments "that were not negotiable by the common law.*" In *Johnson Co. v. Stark*, 24 Ills. 75, and *Supervisors v. Hubbard*, 45 Ills. 139, the doctrine of the New Hope bridge case is emphatically endorsed.

As said in the Bolles case *supra*, by sec. 8 of chap. 98 (R. S. Ills. 718) instruments payable to *bearer* are made negotiable by delivery.

It is true there are some decisions of the Appellate court of Illinois which, notwithstanding this new section, adhere to the construction given in the early cases of *Hilborn v. Actus*, 3 Scam. 344, and *Roosa v. Cist*, 17th Ill. 450, and differ from this court in the construction placed upon this section in *Roberts v. Bolles*; but I am aware of no endorsement of the views of the Appellate court by the Supreme court of the State—the court of last resort.

It seems proper to say here, however, that the decisions of the Appellate court are not *authority*—even in that court—except in the identical case in which they are rendered. By Sec. 3 and 4 of the act establishing the Appellate court (Laws Ills., 1877, p. 69,) it is provided that they shall file their "reasons" in writing for the reversal of cases, but if they affirm

them; it is immaterial—whether they are right or wrong—and whoever is affected by them will ever remain in blissful ignorance of the *reasons* of the court for its adjudication; and if defeated is denied even the cold comfort of knowing why; but, lest the general public should be injuriously affected by the "reasons" of the Appellate court, the concluding portion of the section last quoted enacts, "provided that the *reasons* "so filed 'shall not be of binding authority in any cause or "proceeding other than, that in which they may be filed or "given."

(4.) It was urged upon the trial of this case in the court below, that the decision of the Supreme Court of Illinois in *Garvin v. Wiswell*, 83 Ills., must be taken as a square overruling of the preceding cases, (holding that municipal *bonds* payable to a person named or bearer were negotiable by delivery only). Such is not the effect of that case, as is apparent from the subsequent decision of that court in *Thompson v. Weller*, 85 Ills. 198, and so far as it supports any such inference it is overruled by the latter case; but an attentive examination of *Garvin v. Wiswell* shows that the construction contended for by our adversaries is not tenable. By the Illinois statute any absolute promise to pay money or other valuable thing or article of personal property is negotiable by assignment, so as to pass the *legal title* to the *instrument* to the assignee: but it by no means follows that every negotiable instrument is *commercial paper*, and governed by the law merchant. Clearly a note payable in wheat, corn, or other commodity would not be deemed commercial paper. If we adhere to the original interpretation of the statute given by

the court in the New Hope Bridge case, *supra*, viz., that it was particularly intended to embrace "instruments not negotiable by the common law or the custom of merchants," we have a reasonable solution of the matter. While this court is not bound to follow the decisions of the State court upon questions of commercial law, it certainly would not do so in cases where they are conflicting and inharmonious.

The instrument in *Garver v. Wiswell*, though spoken of as a "bond" by the judge in the delivery of his opinion, was really no *bond*, in the commercial sense of the term, as is apparent. It was issued without any authority of law whatever, there was no *special* act for its issue, and under the general law of the State, the county had no right to issue such evidence of indebtedness for any such purpose, viz., for bounties to volunteers. Nor in any case unless payable on demand. Such an issue could only be made under a special statute, as in *Taylor v. Thompson*, 42 Ills. 11. It was not a general promise to pay, but simply a county order payable out of a *particular fund*, viz., the fund appropriated (not voted by the people) for bounties. This provision, of itself, divested it of the quality necessary to make it commercial paper, viz., that it should only be payable out of this *particular fund*.

In the dissenting opinion of Mr. Justice Dickey, he says, "this paper is not *commercial* paper as is conceded in the "opinion." It was simply a county order or warrant — nothing more or less — as in the cases of *Wall v. County of Monroe*, 103 U. S. 74, and *County of Ouachita v. Wolcott*, *Ibid*, 559.

The courts throughout the country, with almost entire unanimity, endorse with approval the doctrine laid down by Dillon. (See Sec. 427 of *Dillon on Municipal Corporations*, defining the distinction between municipal bonds and county orders. See also *Newell v. School Directors*, 68 Ills. 544; *Turner v. R. R. Co.* 95 Ills. 134; *Mayor v. Ray*, 10 Wall.; *Baird v. Underwood*, 74 Ills. 176; *Hubbard v. Epling*, 81 Ill. 172, and numerous other cases.)

In *Town of Peoria v. Lloyd*, 97 Ills. 179, it was sought to enjoin a subscription and issue of bonds to the R. R. Co., for various alleged irregularities, with reference to the issue and delivery of the bonds. They were payable like those involved in the pending case, to the R. R. Co., "or to the "bearer hereof." (See p. 183.) They had passed into the hands of *bona fide* purchasers, not by *endorsement*, but by *delivery* only. Justice Mulkey, in conclusion, says (pp. 199–200):

"It is also claimed that the bonds in question were never "*delivered* to the Bloomington and Ohio River Railroad "Company, but were *delivered* to the Chicago and Paducah "Railroad Company. The facts are that these bonds, as voted, "are payable to the former company. They were *handed over* "by the agents of the township to P. B. Shumway, who, in "the receipt executed for them, professes to act on behalf of "the Bloomington and Ohio River Railroad Company, as well "as his own company, and there is nothing in the record to "show he was not authorized to do so. But even if it were

"admitted there was an improper delivery of them, by means "of which they passed into the hands of innocent holders, we "are not prepared to hold that the bonds would be void in "their hands. There was ample authority for issuing them; "they were executed in the proper form, and *made payable* "*to the proper party*, and there was nothing pertaining to "them, or could have been ascertained from the record, that "would have indicated they had been *delivered* to one not "entitled to receive them, and certainly, under such circum- "stances, it would be great injustice to the present owners to "hold them invalid.

"Upon the whole, we are of opinion that the decree of "the Circuit court is right, and it is therefore affirmed."

It is submitted that the prosecution of this case (to this court) in view of the decision in *Hackett v. Ottawa*, 99 Ill. 86, is wholly unwarranted, and that the judgments of the court below should be affirmed, with damages against plaintiff in error, for the reason that it is apparent that the case was prosecuted to this court for delay only, and that there is no meritorious defense to the case, it being nothing less than a shameless attempt by the authorities now controlling the city government to defraud the creditors of the city. If, however, your Honors should for any cause, deem it important in the determination of this case to re-investigate the questions as to what is a corporate purpose, as in the Hackett case, *for there is no question of corporate power involved*, your Honors are respectfully referred to the argument of counsel for the defendant in error in the case of *Ottawa v. Carey*, pending and herewith also submitted, that case being also upon some of the

same bonds and coupons issued by the city in pursuance of the ordinance recited upon the face of the bonds involved in this suit.*

G. S. ELDREDGE,

For Defendant in Error.

*An authenticated copy of the proceedings of the City Council, with reference to this case since the rendition of judgment in the court below will be filed herewith, in support of the suggestion that the judgment should be affirmed with damages